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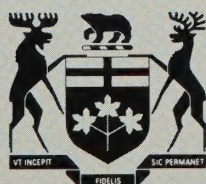
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1985



Ontario



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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1985] OLRB REP. JANUARY

EDITOR: NIMAL V. DISSANAYAKE

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**1489-84-R; 1490-84-R; 1491-84-R; 1492-84-R; 1549-84-R** Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. McDonnell-Ronald Limousine Service Limited, operating as **Airline Limousine**, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Aaroport Limousine Services Ltd. and McIntosh Limousine Services Ltd., Respondents; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Airlift Limousine Service Limited, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Macco Ground Services Limited, operating as Air Cab Limousine, Respondent, v. Group of Employees, Objectors; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Classic Livery Service, a division of Airlift Limousine Service Limited, Respondent

**Certification — Practice and Procedure — Employee status, identity of employer and appropriate unit configuration in dispute — Board reviewing policy considerations of permitting union to review employee lists — Permitting review and making copy of list**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen, Mike Peckan, Sam Schouten and Jim O'Donnell for the applicant; Donald McKillop, Q.C., Barbar Maalouf, Y. Zahavy, Ernest Weintraub, and M. Alitcheh for the respondents; Louise E. Cherevaty and Marion F. Cherevaty for the objectors.*

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD;** January 18, 1985

1. The name of one of the respondents is amended to read: Classic Livery Service, a division of Airlift Limousine Service Limited.

2. In these applications for certification, the union seeks to represent the drivers of the airline limousines that carry passengers to and from Toronto International Airport. In each case the union seeks to represent a broadly-based bargaining unit consisting of all drivers and owner-operators employed by the various respondents. There is some considerable dispute between the parties as to how many drivers there are, their status, and precisely who is their employer. In each case counsel for the respondents takes a variety of alternative positions: that there is no appropriate bargaining unit; that the bargaining unit may consist of only a small number of bus drivers; that some or all of the limousine drivers are not employees but rather independent contractors; that some or all of the limousine drivers are "dependent contractors" (see section 1(1)(h) and 6(5) of the Act); that if some of the drivers are employees they are not necessarily employees of the named respondents; and that if there is any bargaining unit

of “drivers” it should also include a number of persons with the right or licence to drive who were not actually working as drivers on the day the union filed these certification applications.

3. When these applications first came on for a hearing before the Board, it was apparent that it would be necessary to appoint a Board Officer to inquire into the employee lists and the composition of the proposed bargaining unit. During the course of that inquiry, a question arose as to whether the union should be given an opportunity to review and be provided with copies of the lists of employees whom the various respondents assert are appropriately included in the bargaining unit. The respondents argue that the union should not be given access to these lists. The union argues that it is entitled to them, and that they are necessary in order to fairly deal with the issues raised in these cases. In order to assess these positions, it is necessary to briefly outline the certification procedure and the issues arising in these particular cases. The provisions of the Act to which specific reference will be made are as follows:

1. -(1) In this Act,

• • •

(h) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

6. -(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

• • •

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

111. -(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to



disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

4. A typical certification application involves a number of related steps. First the Board determines whether the applicant is a trade union within the meaning of the Act, and whether the application is timely. Then the Board determines the unit of employees appropriate for collective bargaining. Next the Board counts the number of employees in the bargaining unit and determines how many of those employees are “members” of the union as defined in section 1(1)(l) of the Act. If more than fifty-five per cent of the employees in the bargaining unit are members of the union, the Board will usually certify the union as the bargaining agent for the employees in that unit. If less than forty-five per cent of the employees are members, the Board will dismiss the application. If the union’s membership support among the employees in the bargaining unit is between forty-five per cent and fifty-five per cent, the Board will direct that a representation vote be taken. It will be seen, therefore, that a simple certification is a fairly mundane and mechanical process of counting the number of employees and union members, then comparing the totals.

5. But these are not simple certification applications. In each case, there is some considerable dispute as to the identity and number of employees in the bargaining unit, who their employer is, and whether these drivers are (or arguably are) “pure employees”, “independent contractors”, or “dependent contractors” as defined in section 1(1)(h) of the Act. Indeed, counsel for the respondents submits that there are a large number of individuals who, while not currently drivers, should also get notice of these proceedings. Without ruling at this stage on the status of these individuals to take part in these proceedings, it is obvious that the submission raises another area of potential dispute. Finally, it may well be that there are some drivers who are employees or dependent contractors but whose employer is really an independent contractor with a contractual relationship with the named respondent(s).

6. Apart from identifying the status of the drivers affected by this application (i.e. whether they are employees, dependent contractors, or independent contractors), and the identity of their employer, there is an obvious bargaining unit problem — one which the Board has encountered in earlier cases involving drivers of taxis. (See: *Niagara Veteran Taxi*, [1980] OLRB Rep. March 337; and *Blue Line Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056). Pursuant to section 6(5) of the Act, a bargaining unit consisting *solely* of dependent contractors is *deemed* to be a unit of employees appropriate for collective bargaining, but the Board may only include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be so included. In other words, the Board cannot designate a mixed unit of “pure employees” and “dependent contractors” without some indication from the majority of the dependent contractors that they are content with a mixed unit. The Act is silent as to how the Board should go about ascertaining the wishes of the dependent contractors, however, it is obviously necessary to first determine who they are.

7. In summary then, in each of these cases there is a real question concerning the number of drivers potentially affected by the applications. According to the named respondents, there is also some question concerning the identity of the employer of at least some of these individuals. There are questions concerning the drivers’ status (i.e. employee, dependent contractor, or independent contractor), which in turn will affect the way in which the Board is required to structure the bargaining unit and, in the case of persons found to be dependent contractors, establish whose wishes must be canvassed in the event that the union seeks a “mixed unit”.

And, of course, each of these issues raises a mixed question of fact and law which will have to be addressed in evidence by both parties if these cases proceed. It is against this background that we must assess the respondent's submission that the union should not be entitled to access to the list of drivers said to be potentially affected by these applications.

8. At this point it may also be useful to briefly advert to the Board's practice when faced with disputes concerning the accuracy of the employee list or the composition of the bargaining unit. Such disputes are not at all unusual, because our system does not permit a union to seek representation rights solely for those who have become its members or have indicated an appetite for collective bargaining. A union cannot seek certification solely for those employees who have opted to join it. The union must establish majority support in what this Board determines is the appropriate bargaining unit. That determination may not be easy to predict, as the present case indicates. There will necessarily be some degree of uncertainty.

9. The union does not have access to the list of employees during its organizing campaign. It does not have a right to the employees' addresses or telephone numbers, and does not have an automatic right to approach them on the employers' premises or during work time. A union may not have a complete picture of the configuration and composition of the bargaining unit. For example, it may not be able to readily ascertain whether those employees work full-time or part-time (which, in accordance with the Board's usual practice, might warrant the separation of employees into two bargaining units), or whether some of the individuals may exercise managerial functions within the meaning of section 1(3)(b) of the Act, so that they would not be "employees" at all for labour relations purposes. Employees may work on rotating shifts or have an irregular or uncertain work pattern. Even if employees do work a regularly scheduled shift, they may not perform their duties in a fixed location such as a factory or office, but like truck drivers, work "out of" a depot or terminal to which they will periodically return and from which they are dispatched from time to time. In such circumstances, it may be very difficult for a group of employees wishing to exercise their statutory right to form or join a trade union, to identify the precise group of their fellow employees who must be approached and won over if the objective of collective bargaining is to be realized. Those are the usual difficulties of organizing which, in cases such as these, are exacerbated by the apparent problems associated with determining the status of the drivers, their employer, and the bargaining unit configuration. The Act does not address these practical problems of union organizing, and a union must make out as best it can based upon the information supplied by its supporters. The Act does not purport to guarantee equal access to the employees or to information at various stages of the certification process. That being so, it is hardly surprising that when an application for certification is made, a union may not be in a position to accept, without question, the list of employees that the employer asserts are in the bargaining unit. That is why there is nothing novel about a challenge to, or request to review the employee list.

10. We should also observe that "list problems" (i.e. determining the "employees" in the bargaining unit applied for) do not arise only because of the union's inadequate information. The employer, too, may have problems responding accurately to what may well be an unfamiliar process. Upon receipt of notice of the application for certification, the employer is directed to file a reply indicating the number of employees in the union's proposed bargaining unit and, if there is any dispute about that, the description and number of the employees in the employer's proposed unit. (See Rule 7 and Form 10.) In addition, the employer is required to supply four lists of employees: those working "full-time" (more than 24 hours per week); those working part-time (not more than 24 hours per week); those on layoff, and those not at work on the application date for reasons other than layoff (illness, maternity leave, etc.). In all cases, the

employer is expected to list the employees' occupational classification, and for those not at work, the expected date of their return to work. It is required to certify that its lists are accurate. This material must be filed by the terminal date, which will be between five and ten days after the employer is served with notice of the application. Finally, the employer is expected to specifically identify any persons whom it believes should be excluded from or added to the proposed bargaining unit. (See Form 4.)

11. It is obvious that the abbreviated response times mandated by the Rules may sometimes pose problems for an employer — particularly if his own employment records are not up to date, or if he is unfamiliar with the Board's approach in these matters. Where should he put X who usually works on a full-time basis, but at the time of the application was temporarily working part-time? The Board usually (as a "rule of thumb") looks at the seven-week period preceding the application, but will an employer necessarily be familiar with that approach? How much authority must a "supervisor" exercise before being considered by the Board under section 1(3)(b) of the Act not to be an employee at all? Should plant clerical employees be considered part of the plant production unit which a union may be seeking, or part of the office and clerical employees who are typically excluded from a production unit? We need not multiply the examples. We need only note that it is not at all unusual for an employer to discover that certain employees have been inadvertently included or excluded from the lists, and to amend the lists accordingly; nor is it unusual for the parties to have honest differences about the composition of the bargaining unit, even if they are in agreement as to its general description (e.g., whether X should be put in the part-time bargaining unit, or Y is a "foreman" and therefore within the ambit of an agreed exclusion). Either party may well discover that its initial impression was wrong — thereby affecting the arithmetic calculation referred to above, and the statutory consequences that flow from it. These *bona fide* differences are merely more complicated in a case such as the present one, and it is interesting to note that counsel for the respondents has identified some 28 persons who were not listed on the original replies but who, it is now said, should be included in any bargaining unit of "drivers". The respondent itself is seeking to amend the lists, which it maintains the applicant union should not see or copy.

12. On an application for certification, when any issue arises concerning the employee list or the composition of the bargaining unit, the Board's longstanding practice is to determine the bargaining unit description, then permit the applicant union to review the list so that it can identify and particularize any challenges. If the union does not request to see the list or question its accuracy, the Board will proceed on the basis of the information contained therein without the necessity of formal proof. But nothing in the Act or the Rules makes that employee list "confidential", nor is it easy to see where the Board would get the authority to withhold information upon which it planned to act, and which was so clearly necessary to its determination. The records of a trade union relating to membership have been accorded specific statutory treatment, as have other documents revealing employee wishes with respect to union representation. (See section 111 of the Act). Section 111 was passed to reverse judicial decisions requiring the production of such documents revealing employee preferences. (See: *Globe Printing Co. v. Toronto Newspaper Guild* [1951] O.R. 435; [1952] 2 D.L.R. 302; [1953] 3 D.L.R. 561.) Maintaining the confidentiality of a union's membership records helps to protect employees from unlawful reprisals by those employers who do not accept the legitimacy of their right to join a union or engage in collective bargaining. However, there is no similar provision prohibiting or restricting disclosure of the list of employees said to be, or found to be, in the bargaining unit.



13. It is not difficult to understand why the employee list is revealed. It would be a little curious if a trade union were to be granted a certificate because it had established the requisite level of support in the bargaining unit described generally, but left the hearing without a precise understanding of the basis on which its application succeeded. On a more basic level, when even a simple certification case involves a comparison of the union's membership evidence with a list of employees in the bargaining unit, and there are statutorily prescribed consequences flowing from that calculation (a vote, outright certification, or dismissal), the union must be entitled to the employee list if it is to participate in the hearing in a meaningful way. How else can it properly protect and advance the rights of its members? How else can it determine whether the employee list is accurate and correct or whether through error, inadvertence, or improper intent the list of employees said to be in the bargaining unit is inaccurate? Now, of course, there may not be very many cases where an employer intentionally misrepresents the number of employees in the bargaining unit. But, as we have already noted, the speed with which the employer must respond to the certification application, the potential complexity of the issues, and the inevitable exercise of judgment will often result in the production of a list which, at least arguably, is not sufficient for the purpose of making the determinations required under sections 6 and 7 of the Act.

14. In our view, there is no sound basis for denying a trade union the opportunity to review the employee list and, in practice, the union has always been given that opportunity. If a question arises concerning the list the union has never been denied an opportunity to review it. Nor is there any good reason why it should not make a copy or take notes, so that it can pursue its inquiries, on its own time. We do not think that it makes sense to draw a distinction between *reviewing the list* and *taking a copy*, simply because the latter might assist a union in preparing its case or gathering information which could well result in a withdrawal of a challenge. It would be odd to structure a system in such a way as to reward union officials with a good memory, and multiply the difficulties in large bargaining units where there is the greatest potential for error or misjudgement; and we can only speculate about how a court would respond to this "hide and seek" approach to litigation, in which critical assertions of fact may be *revealed* or *reviewed*, but *not* copied, lest the party asserting those facts lose some tactical advantage attributable to the other's ignorance. Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles governing the process by which employees acquire the right to bargain collectively through a union of their choice. If, in the course of a certification application, a union is entitled to review the list — as we find that it is — it is our view that the union should be entitled to make a copy, and, again as a practical matter, a union has always been accorded the right to make a list of all unfamiliar names for the purpose of challenge and investigation.

15. It might be said that providing the union with a list of employees gives it an advantage not only in the particular application under review, *but also in some later application*. It might be said that a union should not have the "tactical advantage" of knowing the parameters of the bargaining unit, or the identity of the employees in it, for the purposes of approaching them at some later time to see whether or not they wish to be represented by a trade union. The list might be "abused"; moreover, a calculating union might apply for certification simply to obtain the list for a *future* campaign. If an employer knew that a union would receive a copy of the employee list, the employer might be tempted not to respond to the certification application, or to make an incomplete response. Finally, it might be said that it is "unfair" that a union be permitted to know who the employees are, and the employer is not permitted to know precisely which of those employees have opted to support the union.

16. No doubt there is some basis for these concerns, but in our view they are overstated. First, from a practical point of view, some two-thirds of all bargaining units have less than forty employees so that a mere perusal will be sufficient to generate an accurate list. It is only in larger bargaining units where a copy of the list gives the union the opportunity for future advantage, but it is precisely in those larger bargaining units that there is greater margin for error by one party or both, and a greater need for a list to identify and investigate the areas of dispute. Employers who believe they may benefit from filing an inaccurate or incomplete reply can do so now, and that fact in itself suggests that a union should have a copy of the list so it can evaluate its position. But the fact is that employers do not usually certify as accurate what they know is not, and unions do not usually file frivolous applications merely for discovery purposes. What does happen quite frequently are innocent errors by the employer, or an innocent miscalculation by the union as to the contours of the bargaining unit and the number of employees in it. Should the Board's process be abused, it has ample authority to deal with the problem.

17. In the instant case, a substantial number of employees have indicated support for trade union representation; and, in the circumstances, it is not surprising that there may be some question as to the identity of the employees in the appropriate bargaining units, their employers, and the definition of the bargaining units themselves. The only thing at all unusual about this case is that the union is seeking to review the list before the bargaining unit description has been finalized. But that request is being made because of the questions raised by the respondent concerning the number and status of the persons in the union's proposed bargaining unit, and in order to address those questions those persons must be identified. In our view, in the circumstances of this case, the union is entitled to a list of the employees potentially included in the bargaining unit, and a copy of such list will be provided.

18. A Board officer is hereby appointed to enquire into the employee lists and the composition of the bargaining unit. Upon identification of the names and addresses of the 28 persons mentioned by the respondent(s), the Board will direct that notice be given to them.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I disagree with my colleagues. If the applicant wishes to examine lists of employee names then it should be done in the presence of a Labour Relations Officer. That is the *only* way that abuse of the Board's procedure can be prevented and is the *only* way that employers can be assured that their lists will not be used by the union for organizing purposes.

2. The reasons for my dissent have been the reasons for the Board's policy concerning these lists since the creation of the Board. They remain as valid now, as they were then.

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**2451-84-R International Molders & Allied Workers Union, Applicant, v. Aluminum Reduction Company, Respondent, v. Group of Employees, Objectors**

**Certification — Petition — Conflict between testimony of two petitioners result of difficulty of recollection — Petitioners participation in employee committee to consult with employer not creating perception of management involvement — Petition found to be voluntary**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

***APPEARANCES:** Frank Luce and Alex Naples for the applicant; G. C. Fuller and I. Lissack for the respondent; Harvey Jones and Roy Watson for the objectors.*

**DECISION OF VICE-CHAIRMAN, M. G. MITCHNICK AND BOARD MEMBER I. M. STAMP; January 17, 1985**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The Board finds that all employees of the respondent at its operation in Concord, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff, constitute a unit appropriate for collective bargaining.
4. The applicant in this matter filed membership evidence at a level well in excess of that required for certification without a vote. Sections 7(2) and (3) of the Act provide:

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

There was, however, also a statement in opposition filed in a timely fashion in this matter. That statement, or "petition", was signed by a substantial number of employees who also signed cards, so that if the Board were satisfied that the petition were voluntary, it would reduce the number of unqualified cards in support of the applicant well below the level of fifty-five per cent. In that case the Board would normally direct the taking of a representation vote, on the basis that the cards alone were not a reliable indication of the wishes of more than fifty-five per cent of the unit. The Board accordingly conducted its usual inquiry into the origination of the statement in opposition, and the circumstances under which employees were asked to sign it.



5. The two employees who appeared before the Board in support of the petition were Frank Jones, a truck-driver, and Roy Watson, a maintenance man. The petition itself was prepared and for the most part circulated by Mr. Jones. Mr. Jones testified that he noticed the "green sheet" (Notice to Employees) that was posted in the plant, and took the time to read it when he returned from deliveries. He was himself opposed to the unionization of the plant, and noted that employees could indicate such opposition by sending a statement to the Board by registered mail, not later than the terminal date, Friday, December 14th. Mr. Jones was uncertain what such a statement would involve, and decided to discuss the matter with other employees when he had the opportunity. Mr. Jones testified that that is what he did, the main discussion occurring in the lunchroom that same day, as he and other employees were waiting to punch out. The only other employee he could recall specifically discussing the matter with at that point was Mr. Watson, although he testified that other employees were involved in the discussion as well. Mr. Jones says that he had some discussion about the wording, and went home that night and wrote it up.

6. The next morning Mr. Jones produced the petition in the lunchroom as employees congregated, in their normal way, to punch in, and invited anyone who was interested to sign their name. A number of employees, including Mr. Jones, signed at that time, and Mr. Jones continued to gather signatures before and after work or at break time over the next two days. Mr. Watson was not present in the lunchroom the morning that Mr. Jones first announced the petition, but signed it when approached by Mr. Jones at some point later in the day. He also told Mr. Jones that he could be called upon to help in the solicitation of signatures, if required.

7. On the Thursday afternoon, Mr. Jones and Mr. Watson did have a discussion about two additional employees who had expressed an interest in signing. Mr. Jones' recollection was that Mr. Watson knew the two men and mentioned them, while Mr. Watson's recollection was that Mr. Jones was aware of the two men's desire to sign, but needed help making contact with them. In any event, Mr. Watson took the petition from Mr. Jones, and at the change of shift that day obtained the other two signatures. The next morning Mr. Watson saw Mr. Jones in the locker-room at the 9:30 break, and gave him back the petition. Mr. Watson may have said at that point, "Don't forget to send it by registered mail", but Mr. Jones says he already knew that. Mr. Jones then took it with him when he went out on his deliveries, made a photocopy at the library, and mailed the petition to the Board. According to Mr. Jones, he did not specifically show the photostatic copy of the petition to Mr. Watson when he returned that day, although Mr. Watson may have seen it folded in his hand. Mr. Jones testified that he had generally kept the petition in his locker prior to mailing it, and that he was unaware of any problems having occurred with locker break-ins in the past.

8. Mr. Watson had voluntarily excluded himself from the hearing room while Mr. Jones testified (after a discussion of the applicability and rationale of an order excluding witnesses) and his own account of the events differed in a number of respects from Mr. Jones. He testified that he had been one of the last to sign a union card, and that he began to have second thoughts when he heard through the grapevine that a number of other employees had been "pressured" into signing cards. He said that he and other employees had also begun wondering what it was the union was going to do for them, and were unable to obtain any direct responses from the union organizers. According to Mr. Watson, on the day the "green sheet" went up he went to the lunchroom to punch out and found a number of employees discussing whether there wasn't some way to hold off the union from coming in, and he said: "Funny, I was thinking the same thing". The discussion, he said, moved to the question of a petition, and Frank Jones volunteered to take something around. Mr. Watson told Mr. Jones to be sure to come and see him, because

he definitely wanted to sign. Apart from that, Mr. Watson says he played no major role in the discussion, and does not recall specifically discussing the wording for the petition. He says he saw Mr. Jones the next day, and Mr. Jones indicated he had had some help with the wording from another employee, known to the employees generally as a "bar-room lawyer". Only Mr. Jones and Mr. Watson came to the hearing to represent the petitioners, however, and Mr. Watson stated that he would prefer not to identify the other individual whom Mr. Jones said had helped him. No one insisted that Mr. Watson make that disclosure, and the Board did not direct it.

9. Mr. Watson acknowledged on cross-examination that he had been unable to verify the alleged "pressure" tactics he said he had heard about, but testified that Mr. Jones himself had told him of a threat to burn Mr. Jones' house down for taking around the petition. Mr. Watson also says that Mr. Jones mentioned when the petition was being passed between them that someone had tried to break into his locker. Mr. Watson went over to Mr. Jones' locker and observed that both the top and bottom of the locker door had been forced out. Mr. Watson testified that he gave the petition back to Mr. Jones at the start of the shift on Friday, and then corrected himself to say that it was more probably at the morning break that he did so. He says that he saw Mr. Jones put the petition in an envelope a few minutes later, and that at that point Mr. Jones had a photostat of the petition in his hand. Mr. Watson testified that he was certain that he saw the photostat at that time.

10. The respondent company has been in receivership for a couple of years, and a new Plant Manager, Greg Fuller, was brought in some months ago to attempt to turn the situation around. Employees had, however, not received a wage increase for over a year, and discontent over this led to the election by the employees of five of their number to approach Mr. Fuller as a "committee" to discuss improvements. These meetings began in August of 1984, and both Mr. Jones and Mr. Watson were on that committee. Eventually Mr. Fuller suggested that two employees be selected to sit down with him more regularly, and Mr. Watson and another employee volunteered to take on this role. The discussions between the three of them culminated in a wage increase in October, and the meetings with Mr. Fuller have not continued beyond that month. No improvement was made to the benefit package, which includes OHIP 100 per cent company-paid, a dental plan, and a supplementary health plan, and which Mr. Watson and Mr. Jones, at least, considered to be reasonable. Mr. Jones acknowledges saying to other employees when discussing the petition and the subject of benefits that there appeared to be no point bringing a union in to bargain for things the employees already had, but he could not recall who was the first to put forward that thought. Mr. Watson testified that he felt there was a concern "in everyone's mind" that the employees might lose the benefits they already had if the union came in, and that a lot of people said: "The union might go and screw it up".

11. The applicant submits that the Board, on the basis of the petitioners' evidence, should not accept the petition as a voluntary statement of employee wishes. It points, first of all, to the failure of the alleged "bar-room lawyer" to be produced as a witness. Mr. Jones was asked in reply about this other individual, and testified that he talked to several employees about starting the petition, but could not discern from Mr. Watson's evidence who it was that Mr. Watson was referring to specifically. Had that individual been someone improper, it seems highly unlikely that Mr. Watson would have volunteered this evidence to the Board, while at the same time making an issue over whether or not the name had to be publicly disclosed. The more striking matter is the apparent difference in the two men's evidence as to the role of Mr. Watson. Mr. Jones did, however, name Mr. Watson as only one of a number of employees he was discussing the petition with. Mr. Watson, we observed, is a more senior employee of

a somewhat combative and opinionated nature (hence, perhaps, his role on the employee committee), and it is not beyond our comprehension how Mr. Jones and Mr. Watson might have perceived the level of Mr. Watson's participation in the discussions differently. There is no evidence whatever to give an appearance of a link between any of the petitioners and the company, the closest being the fact that both Mr. Jones and Mr. Watson, and particularly the latter, had served as *employee* spokesmen in dealing with the company previously. But those meetings had, to the knowledge of all employees, completed their work and terminated in October. And to the extent that Mr. Watson ultimately had come to be one of the two main contact points with management, he himself played a non-prominent role so far as the circulation of the petition was concerned, apart from the final two signatures.

12. The applicant also places emphasis on the fact that Mr. Jones, a truck-driver, was allowed to remain in the plant during the three days he was circulating the petition. But Mr. Jones testified that the time he spends on the road each week varies from every day to no days, and he was in fact on the road for a good part of Friday, and, it would appear, Tuesday of that week. On the evidence we do not conclude that the treatment of Mr. Jones in that week was so different as to make it appear to employees that management must have been assisting in the circulation of the petition.

13. On the whole, we find the conflicts in the two petitioners' evidence as consistent with both petitioners trying to recount the events honestly and independently from their own recollection, as with either of them trying to deliberately mislead the Board. As noted, for example, their recollection differed on how the conversation which led to Mr. Watson's taking possession of the petition began. But given the common knowledge of Mr. Jones' petition, and the number of employees he talked to about circulating it, it may be that one or both are mistaken in their recollection of the course of the Thursday-night discussion, or of how it first came to either of their attention that the two off-shift employees were desirous of signing the document, without the Board being compelled to conclude that that information came through management. On the question of the fire threat, Mr. Jones testified in reply that he had simply overheard a comment on the floor that his petitioning activities could lead to him having his house burned down, and although he mentioned it to Mr. Watson in passing, he placed no weight on it. With respect to the attempt on his locker, he testified in reply that he did not mention it because he had been unaware of any such problems *prior* to that, and that he was not in a position to suggest who had carried out that act, or why. There is no evidence, as the applicant would argue, that Mr. Jones was trying to "trade" on those incidents with other employees to misrepresent what the union was doing, and certainly Mr. Jones made no effort to use them to denigrate the other side when testifying before the Board.

14. The petitioners' evidence was also in conflict over the time when the photostat of the petition was made. Mr. Watson says he saw the photostat in Mr. Jones' hand as Mr. Jones was putting the petition into an envelope for mailing. Mr. Jones says he made the photostat while he was out on his rounds later in the morning, and that Mr. Watson is simply incorrect. In light of the difficulty which Mr. Watson demonstrated in recalling the order of events on that Friday, we are not prepared to conclude that Mr. Jones chose to lie to us about where he photostated the petition. Rather, while we have no doubt that Mr. Watson did in fact see the photostatic copy in Mr. Jones' hand, as Mr. Jones himself had testified, we conclude that Mr. Watson was in fact mistaken in his recollection of the occasion when he first made that observation. Influencing that conclusion is our observation that Mr. Watson, as a matter of personality, tended to be absolutely certain of various points when testifying initially, only to be subsequently shown to be incorrect.



15. The final matter raised by the applicant, and the one of most concern, is the admitted reference by Mr. Jones in circulating the petition to the possibility of employees *losing* benefits if the union were allowed in. Such a possibility did not, however, come from the mouth of anyone with authority in the company, and probably represents an unrealistic appraisal of where the parties would be in bargaining. The question, however, is whether, *on these particular facts*, the employee making the statement would be perceived by others as delivering a message from management. Once again, therefore, the relevant factor present here is the role Mr. Jones had played as an employee on the original five-man committee which had been put forward to communicate with management. Again, however, those meetings were no longer ongoing, and the benefit package itself was not one of the areas in which improvement had just recently been negotiated. But more critically, management itself neither said or did *anything* at this stage that would suggest to employees that the concerns expressed by Mr. Jones had their source, covertly or otherwise, in a strong reaction by management. For cases involving different circumstances, but which placed similar emphasis on the restrained response of management, in finding a petition voluntary, see *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551; *Consumers Distributing* [1982] OLRB Rep. January 26. On all of the evidence here the Board does not find it probable that employees would have viewed Mr. Jones' concerns over having to negotiate to maintain the existing level of benefits as a veiled threat emanating from management, rather than an idea that Mr. Jones, and other employees, were capable of formulating on their own.

16. The Board might note finally that the company and petitioner representatives demonstrated a closeness at the hearing not normally considered appropriate for the context. Having heard the evidence, however, and assessed the demeanor of the witnesses, the Board has satisfied itself that the course of conduct displayed at the hearing was a reflection of no more than an uneducated lack of awareness of normal protocol before the Board, rather than of any connivance pre-dating the actual appearance at the hearing, and, if anything, re-inforced the impression that both groups were at least dealing openly with the Board.

17. The Board therefore finds nothing which would cause it to disregard the petition placed before it, and that petition on its face raises a question whether the applicant has continued to enjoy the support of a majority of the employees in the proposed unit. A secret-ballot vote will accordingly be taken of the employees of the respondent in the bargaining unit described above, so that the Board can satisfy itself of the present state of the majority's wishes, prior to requiring the applicant to endeavour to bargain a collective agreement with the respondent. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

18. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

19. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. I dissent there were too many contradictions in Harvey Jones' testimony for him to be considered a credible witness. Jones' testimony was that he and Roy Watson both discussed the Union Act application during lunch time and they both felt they should send in an opposition letter to the application and including how to word it.

2. Jones was part of an employee committee of five people selected by employees to meet with the company on wages and benefits. At the recommendation of G.C. Fuller, the Production Manager, the committee was reduced to two.

3. Jones never mentioned any threats in his examination but was recalled to the stand by the Board when Roy Watson stated Jones had said there had been a threat to burn his house for circulating a petition and someone also tried to break into his locker.

4. Jones did admit under cross-examination that he mentioned to employees the union would have to bargain for the benefits they were now receiving, a statement that would suggest that the benefits could be lost in negotiations.

5. When Roy Watson was under examination he contradicted Jones' testimony on the origination of the petition. He said he didn't know who originated the petition, and didn't know who suggested the petition idea. That discussion on the petition had started in the group before he joined it and that when he signed it after several others had signed it was the first he saw of it.

6. Both Jones and Watson stated another person had informed Jones of what to do on the petitions but never revealed who that person was. It is my contention that because of Jones' and Watson's inconsistencies that Jones should not be believed. Jones was a member of the original employee committee that met the company on Wages and Benefits. Therefore, his statement while circulating the petition that the union would have to re-bargain the present benefit package could lead the employees to perceive that the Board of Management was behind the petition, thereby not reflecting the true wishes of the employees.

7. I would have rejected the petition and certified the union without a vote.

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**0623-84-U Thomas Beck, Complainant, v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Respondent**

**Duty of Fair Referral — Unfair Labour Practice — Union Business Manager faced with unusual and urgent request for union members — Waiving strict hiring hall rule that slips be obtained before commencement of employment — Discretion exercised in good faith to foster and promote employment for members — Failure to actively seek employment for complainant as job steward explained by collective agreement — No violation**

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members F. C. Burnet and R. Wilson.

**APPEARANCES:** *Tom Beck on his own behalf; Bryan D. Hackett, and Sean O’Ryan for the respondent.*

**DECISION OF THE BOARD;** January 9, 1985

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2. This is a complaint filed under section 89 of the *Labour Relations Act* alleging a violation of sections 68 and 69 of the Act. At the opening of the hearing the complainant withdrew that portion of his complaint alleging a violation of section 68 and elected to proceed only with the complaint alleging a violation of section 69.

3. The evidence before the Board in this matter was adduced through the testimony of Debbie Ratcliffe, the dispatcher employed by the respondent in its hiring hall, and Sean O’Ryan, the business manager of the respondent. The complainant chose not to give evidence in this proceeding. The evidence relating to the material facts relevant to the complaint was clear and uncontradicted. The Board notes that although the complainant attempted to raise some doubts about the veracity of the evidence explaining some of the respondent’s conduct through his examination-in-chief and re-examination of Ms. Ratcliffe, a witness whom he had summoned, and the cross-examination of Mr. O’Ryan, the Board accepts without hesitation the evidence given by those two witnesses, particularly in the absence of any evidence adduced by the complainant to contradict or explain the testimony of Ms. Ratcliffe or Mr. O’Ryan.

4. The respondent operates a hiring hall pursuant to several different collective agreements relating to various sectors of the construction industry and industrial maintenance industry. Under some of those collective agreements, the hiring by employers is done entirely by way of dispatch from the respondent’s hiring hall. Under the other agreements, and in particular, under the provincial agreement relating to the industrial, commercial and institutional sector of the construction industry, an employer is free to select the union members it wishes to hire, so long as those members obtain referral slips from the respondent. The respondent’s members are free to solicit employers for work, provided they obtain a referral slip from the respondent before commencing work. The respondent will also dispatch its members to jobs with employers bound by the provincial agreement for work in the industrial, commercial and institutional sector of the construction industry if such an employer calls the respondent’s hiring hall for employees.



5. A register or out-of-work list is kept of unemployed members of the respondent who are listed in one of three classifications; steamfitter, plumber or welder. When a member's employment is terminated, he can register with the hiring hall. When a member is referred to a job, his name is removed from the register. However, there is a 30 day rule under which a member who is referred to a job of less than 30 working days' duration does not lose his place on the list. Only the number of days actually worked by that member is added to his date of registration on the out-of-work list. The member's date of registration with the hiring hall determines the member's place on the out-of-work list.

6. The dispatcher maintains a work record card for each member of the respondent registered on the out-of-work list. (See exhibit #5.) The dispatcher records the details of a member's employment on that card. The cards are kept in the order that the members are ranked on the out-of-work list. A duplicate set of cards are kept in the same order locked under glass so that members coming to the hiring hall can determine their ranking on the list. Daily, the dispatcher also posts a chart showing the details of hiring of the respondent's members. The chart lists the name of the member, the member's classification, the contractor, the job location, the name of the project and whether the job was obtained either by the member through direct contact between the employer and member or by dispatch from the hiring hall. (See exhibits #4 and #6.)

7. If a contractor calls the hiring hall for employees, the dispatcher attempts to contact the members in the order that they are ranked on the out-of-work list. Any call the dispatcher makes to a member is recorded on the member's work record card. A member may refuse to accept a referral from the hiring hall without losing his place on the list. A member may also inspect his own work record card on request.

8. The complainant does not challenge the general hiring hall procedures used by the respondent. Rather he alleges that the respondent violated section 69 of the *Labour Relations Act* by the way it dealt with a request for employees by Baragar Mechanical Installation to work on a job at the Consumers Glass plant on Kipling Ave. in Metropolitan Toronto on Thursday, May 24, 1984.

9. On Wednesday, May 23, 1984, an explosion occurred at the Consumers Glass plant on Kipling Ave. at approximately 2:30 p.m. The respondent had been advised at a later date by Howard Hanford, the President of Baragar Mechanical Installation that the explosion had put the plant out of production and had caused the lay-off of approximately 600 employees of Consumers Glass. Baragar Mechanical Installation had been working in that plant prior to the explosion. Between 3 and 3:30 p.m. that Wednesday afternoon, Consumers Glass had asked Baragar Mechanical Installation to begin repair work as soon as possible. As a result of that request, Baragar Mechanical Installation began contacting members of the respondent that it knew in order to hire them for this repair work. Other members of the respondent who heard about the Baragar Mechanical Installation job, presumably from people that had already been contacted, began calling Baragar Mechanical Installation directly, for employment.

10. The job at Consumers Glass required two 12-hour shifts with 10 employees on each shift. The first shift began working the evening of Wednesday, May 23, 1984. Apparently, Baragar Mechanical Installation had transferred some of its own employees, who were members of the respondent, from other jobs to the Consumers Glass job. The respondent's members hired at that time did not immediately obtain referral slips from the respondent before commencing work because of the hiring hall's hours of operation. Ms. Ratcliffe found out on Thursday

morning, May 24 that one or two members had commenced working for Baragar Mechanical Installation at the Consumers Glass job without a referral slip. Also on that morning, Mr. Hanford called the hiring hall and requested that twelve pipefitters and one welder be dispatched to the Consumers Glass job as soon as possible. Later that morning, he called to cancel the order because he had been able to fill his requirements by directly hiring members of the respondent who had solicited their own jobs with Baragar Mechanical Installations. However, between the first and second call to the hiring hall from Mr. Hanford, Ms. Ratcliffe had contacted three members, including the complainant, who at the time of the second telephone call were either on their way to the job or on their way to the hiring hall to pick up a referral slip. Ms. Ratcliffe informed Mr. Hanford of this and as a result, Baragar Mechanical Installation agreed to increase its complement by three additional people.

11. Ms. Ratcliffe had advised all three members whom she dispatched to the Baragar Mechanical Installation job at Consumers Glass, including the complainant, that the job was urgent and that they had to be on the job by noon. The complainant had told her on the phone that he would make his own arrangements with Baragar Mechanical Installations. The complainant picked up his referral slip at the hiring hall at approximately 11:00 a.m. but did not arrive at the Consumers Glass job until approximately 4 p.m. that afternoon. Mr. Hanford refused to hire the complainant for the day shift because he was too late, and the job had been filled by another member of the respondent. The complainant was permitted to wait to see if any person who had been hired for the evening shift failed to appear, but everyone who had been hired arrived for work for that evening shift.

12. A grievance was later filed and referred to arbitration before a different panel of this Board by the respondent relating to the complainant's attempt to be hired on that day. That decision (Board File No. 0857-84-M, October 11, 1984, unreported, which was filed by the respondent with this panel of the Board) outlines in greater detail the circumstances of the refusal of Baragar Mechanical Installation to hire the complainant on May 24, 1984.

13. Baragar Mechanical Installation had hired twenty-one of the respondent's members for the Consumers Glass job, and of those twenty-one, seven did not have referral slips from the respondent when they were hired. Referral slips were issued by the respondent to those members subsequently on May 25, 1984. On that day, Mr. Hanford called the respondent and advised it of the names of all of the respondent's members who had been hired to work for Baragar Mechanical Installation on the Consumers Glass job.

14. Working rule 2 of the respondent's hiring hall rules (exhibit #1) provides:

There shall be a form known as a "work referral slip." This to be issued by the Local Union to members when they have secured a job, either through the Local Union office or their own solicitation.

No one may start work prior to picking up a work slip.

Slips may be picked up at the office between the hours of 7:30 a.m. and 4:00 p.m.

Working rule 2 is complemented by article 101 of the provincial agreement, (exhibit #2) section 101.1, which provides:

The Contractor agrees to give preference in employment to Members of the Union having jurisdiction over the area where the work is being performed. Such Member shall have his Certificate of Qualification for the trade required, and shall present to the Contractor a Work Referral Slip issued to him by the Union.

Furthermore, paragraph 16 of by-law 4 of the respondent's by-laws (exhibit #3) states:

No member of Local Union 46, or member of the United Association working within the jurisdiction of Local Union 46, shall take up employment with any contractor except in accordance with the hiring procedures established by Local Union 46, under powers granted in this or other By-Laws of Local Union 46.

15. The respondent has, on occasion, permitted its members to commence employment without first picking up a referral slip, particularly where the job site is isolated, such as a pipeline job, and the members must travel a long distance to get the referral slip. On those occasions the referral slips have been mailed to the members. Also, the respondent has not required a member to obtain a referral slip before starting work on a job if that job is located in the western part of the respondent's geographic jurisdiction, and the member referred to that job lives in the vicinity of the job. In those cases members' referral slips have been sent with another of the respondent's members working on that job who has picked up the referral slips at the respondent's hiring hall, which is located in Scarborough.

16. The Board was advised that the respondent will always issue a referral slip to any member who obtains a job with an employer bound by the provincial agreement through direct solicitation, unless a "hold" is placed on that job by respondent. At the time relevant to this complaint, May 24 and May 25, no hold had been put on the Baragar Mechanical Installation job at Consumers Glass.

17. The complainant had also received a letter from a business representative of the respondent, which purported to advise Baragar Mechanical Installation that the complainant had been appointed the job steward. (See exhibit #7.) Baragar Mechanical Installation refused to recognize the complainant as a job steward since he was not its employee. Mr. O'Ryan explained that the complainant could not be the steward on that job since he had not been hired by Baragar Mechanical Installation and therefore was not an employee. Mr. O'Ryan referred to the provincial agreement which, in his view, required that a job steward be an employee. He specifically directed the Board to article 103 of the provincial agreement, section 103.1, which provides:

Where, in the opinion of the Union, a Job Steward is required, the Business Manager or his representative shall make such appointment *from among the Contractor's employees* who are qualified journeymen and if possible one in possession of a 'Class A' Safety Certificate from the Construction Safety Association of Ontario.

[emphasis added]

18. Mr. O'Ryan testified that he thought it was in the best interests of the entire membership of the respondent to secure employment for as many of its members as quickly



as possible. Mr. O’Ryan said that in the unusual and emergency circumstances of the Baragar Mechanical Installation job at Consumers Glass, strict compliance with the referral slip requirements in the hiring hall rules and provincial agreement might well have prevented the necessary number of people from getting to work quickly. He felt that strict adherence to those requirements could have jeopardized the ability of Baragar Mechanical Installation to perform the job required for Consumers Glass. Mr. O’Ryan said he was concerned that if Consumers Glass formed the opinion that a contractor in a collective bargaining relationship with the respondent could not act promptly to deal with an emergency because of union rules requiring referral slips before work could commence, all of the plant maintenance and repair work for Consumers Glass might go to either non-union contractors or be performed directly by employees of Consumers Glass.

19. Mr. Beck’s complaint of a violation of section 69 is based on the respondent permitting some of its members to be hired by Baragar Mechanical Installation without a referral slip, contrary to the union’s hiring hall rules and by-laws, and also by not actively attempting to secure his employment with Baragar Mechanical Installation since he was appointed job steward. He argued that the respondent discriminated against him because, in the past, when stewards have been laid off and not re-hired by an employer, the union has put a “hold” on referral slips for that employer until the steward is hired.

20. Dealing with the second point first, the provincial agreement binding on the respondent and Baragar Mechanical Installation provides the complete answer to that element of this complaint. The complainant was not an employee when the letter appointing him steward was issued. Therefore, under the provincial agreement, he could not be a job steward until he became employed by Baragar Mechanical Installation. Nor was the complainant a steward who was laid off, thus clearly distinguishing the complainant’s case from the ones that the complainant had referred to as evidence of discrimination. In our view, the evidence in this case did not even disclose a hint of discrimination against the complainant by the respondent not putting a hold on referral slips to Baragar Mechanical Installations to compel the hiring of the complainant.

21. As for the first element of this complaint, the complainant contends that he would have been hired if he had not gone to the hiring hall for a referral slip, but instead had gone directly to the job. He submitted that it was possible that another member took the complainant’s job since that other member went to the job before the complainant did because that other member did not get a referral slip from the respondent before being hired while the complainant stopped at the hiring hall to pick up his referral slip. The complainant argues that the business manager of the respondent acted arbitrarily in violation of section 69 of the *Labour Relations Act* by deliberately violating the hiring hall rules and union by-laws as they relate to referral slips by permitting members to be hired without referral slips and then subsequently issuing referral slips to them and that such arbitrary conduct resulted in the complainant not being employed by Baragar Mechanical Installation for the duration of the Consumers Glass job.

22. The role of the Board in assessing the merits of a complaint alleging a violation of section 69 is to decide whether a union which is subject to that section acted in a manner that is arbitrary, discriminatory or in bad faith. In making that decision, the Board may have to ascertain whether certain hiring hall rules or union by-laws have been violated. However, it is not the function of the Board to determine whether there has been a violation of a union’s rules or by-laws. *A. J. Roberts*, [1974] OLRB Rep. March 169 at 172; *Ontario Hydro*, [1980] OLRB Rep. July 1039 at 1043; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775 at 1781-82.

It need only do so where that determination will be relevant to the issue of whether the respondent's conduct was arbitrary, discriminatory or in bad faith. (See *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014 at 2023.)

23. The complainant argues that the respondent's business manager had no authority to waive the strict requirements of the hiring hall rules or by-laws, and further that such authority could only come from a new by-law passed by the membership. In our view, whether the business manager did have the actual authority under the respondent's constitution, by-laws or hiring hall rules to do what he did is not the issue. Mr. O'Ryan clearly thought he did have the authority to decide to exercise some discretion in applying the hiring hall rules, and acted in a way which he thought would benefit the respondent and its membership. Indeed, there had previously been waivers of the referral slip requirement and there was no evidence put before the Board to suggest that such conduct had been challenged as being in violation of the laws of the respondent.

24. The Board faced a similar type of argument in *Rupert S. Martin*, [1977] OLRB Rep. Oct. 671 at 675:

If under the respondent's constitution or bylaws the decision made by Mr. Morris should in fact have been made by some other person or body (and the Board would note that there is no evidence before it to this effect) then it was always open for the complainant, as a union member, to seek to ensure that the constitution or bylaws were being adhered to either by going through the internal process of the union or possibly by taking the matter into the Courts. While this Board has the authority under the Act to determine whether or not a union has violated its duty under section 60a [now 69], it does not have the authority to police union constitutions and bylaws. This is not to say, however, that *where a union's constitution or bylaws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or bylaws*, that those actions might not be a relevant factor in determining whether or not a breach of section 60a has occurred. Mr. Morris' actions in this case clearly did not come within this class of conduct.

[emphasis added]

We are satisfied that Mr. O'Ryan had a reasonable basis for thinking that he had the authority to decide to exercise some discretion in strictly applying the hiring hall rules of the respondent in the unusual circumstances of May 23 and May 24, 1984. The constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (exhibit #8) provides in section 104 that it is "the solemn duty and obligation" of the business manager of a Local Union "to . . . foster and promote employment for members of the Local Union." If Mr. O'Ryan had reasonable grounds to believe that deciding to exercise some discretion in the circumstances confronting the respondent on May 23 and 24, 1984 was fulfilling the duty or discharging the obligations that a business manager of a Local Union has under the Union's constitution, it cannot be said that the ". . . union's constitution or bylaws have been deliberately flouted . . .". The explanation he provided to the Board satisfies us that he did have reasonable grounds to believe that he was discharging his obligations under the constitution to "foster and promote employment" for members of the respondent.

25. The Board has also commented on a situation somewhat analagous to the facts of this complaint where the strict rules of the union's hiring hall were not adhered to due to the exercise of discretion in the application of those rules by officials of the union. In *John Cooper*, [1984] OLRB Rep. Jan. 6 the Board discussed its earlier decision in *Richard Boon and Labourers International Union of North America, Local 247*, Board File No. 2393-81-U; decision dated Sept. 21, 1982, unreported, in the following terms at page 16 — 18:

In *Boon*, the union hiring hall was in fact run on a strict first in, first out basis, and the gist of the complaint was that the union's officers had introduced a discretionary element into the system by taking into account the expiry of members' UIC benefits. That exercise of discretion was the subject of complaint. . . .The Board commented:

13. It is clear that the operation of any hiring hall is a complicated matter and undoubtedly must involve various levels of discretion. Presumably a hiring hall is operated correctly if that discretion is exercised in a manner which is demonstrably for the benefit of the members of the union. As a consequence, unions frequently make specific rules concerning the operation of the hiring hall and, indeed, the respondent local trade union has in fact formally set out the informal rules which had governed the operation of its hiring hall. Although these rules have been set out in the by-law, it is clear that they nevertheless involve the use of discretion. That discretion, however, cannot be exercised in a manner contrary to section 69 of the Act. However, the mere exercise of discretion does not in of itself constitute a violation of section 69. What gives rise to a complaint under section 69 is the manner in which the discretion is exercised. . . .

38. Neither the fact of discretion nor its exercise are, per se, illegal. Discretion is inevitable in the circumstances. The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make any honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused — for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations.



26. In our view the Board's comments in those cases are equally applicable here. The respondent was faced with a situation which required prompt action. The referral slip requirement set out in the hiring hall rules was not strictly adhered to, but the necessary referral slips were subsequently issued on Mr. O'Ryan's direction. The respondent had also in the past, in special circumstances, not required members to have their referral slips in hand before being hired. We believe that the respondent, rather than acting arbitrarily or in bad faith, or in a discriminatory manner, acted responsibly in a situation which required some flexibility in order to ensure that its members could promptly start work and perhaps more importantly, to demonstrate to the client of Baragar Mechanical Installation that a "union contractor" could act quickly to deal with emergency situations in the hope that future work for Consumers Glass would go to employers who are in a collective bargaining relationship with the respondent.

27. We are also of the view that not only did the respondent not act contrary to the *Labour Relations Act*, the complainant was the author of his own misfortune. He did not testify as to why he arrived at the job some four hours after the time he was told he was to start. During the course of the hearing, his questioning of the witnesses alluded to some possible circumstances that might have explained his delay, such as waiting for the letter appointing him steward to be typed, but he did not come forward to give any evidence of an explanation.

28. Additionally, there was no specific evidence that the actual job for which the complainant was referred was filled by another member who did not have a referral slip. While it was *possible* that the job to which the complainant was going was taken by another member who had been hired without first obtaining a referral slip, in our view the evidence suggests that it is more probable that Baragar Mechanical Installation filled that particular job with a member of the respondent who had already picked up a referral slip or was already employed by Baragar Mechanical Installation, bearing in mind that only one-third of the employees hired by Baragar Mechanical Installation did not have a referral slip before they started work. Therefore, we are not persuaded that the job to which the complainant had been referred was filled by someone who had not obtained a referral slip before being hired.

29. In our opinion, the respondent's appreciation in this case of the potential harmful consequences that could have resulted by a strict and technical application of the hiring hall rules was far from arbitrary. We have expressly not determined whether the respondent's actions were contrary to the hiring hall rules, or whether Mr. O'Ryan violated any of the union's laws. However, we are satisfied that whether or not those rules or laws were violated, the respondent did not act in bad faith, nor did it act in a manner that was either arbitrary or discriminatory.

30. For the foregoing reasons, this complaint is hereby dismissed.

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**2155-83-M Irene Bovay, Complainant, v. Canadian Union of Public Employees, Local 16. Respondent**

**Financial Statement — Statement not containing details as to individual items of expenditure — Whether inadequate**

**BEFORE:** Robert D. Howe, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

***APPEARANCES:** Irene Bovay, Terry Davey, John Clark, Beulah Dunn and Anthony Bradley for the complainant; P. Jordison, Camille G. Masse, Ken Charlsley, Gilles Le Bel, Tim Edwards, Dianne Dumanski and Barb Edwards for the respondent.*

**DECISION OF THE BOARD;** January 22, 1985

1. The name of the respondent is amended to "Canadian Union of Public Employees, Local 16".
2. The complainant, Irene Bovay, has complained pursuant to the provisions of section 85(2) of the *Labour Relations Act* that the audited financial statements furnished by the respondent (also referred to in this decision as "Local 16", the "Local", and the "Union") for the twelve-month period ending September 30, 1982, and for the six-month period ending March 31, 1983, are inadequate.
3. Section 85(2) provides:  
  
Where a member of a trade union complains that an audited financial statement is inadequate, the Board may inquire into the complaint and the Board may order the trade union to prepare another audited financial statement in a form and containing such particulars as the Board considers appropriate and the Board may further order that the audited financial statement, as rectified, be certified by a person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.
4. The hearing of this matter commenced on February 21, 1984 in Sault Ste. Marie, and continued on May 7, 8, 30, 31, September 11, 12, 13, and November 14 and 15, 1984. During those ten days of hearing, the Board heard the evidence of 13 witnesses and received 59 exhibits. The hearing of this matter was substantially prolonged by the inability or unwillingness of the complainant's representatives, Terry Davey and John Clark, to confine themselves to adducing evidence and making submissions relevant to the disposition of this complaint.
5. In making the findings of fact contained in this decision, we have considered all of the aforementioned oral and documentary evidence, the submissions of the parties concerning that evidence, our assessment of the relative credibility of the witnesses, and the inferences which may reasonably be drawn from the totality of the evidence.
6. The audited financial statements in question (also referred to in this decision, for ease of reference, as the "Statements") were prepared by Dunwoody and Company, Chartered Accountants ("Dunwoody"), under the supervision of Donald Missere. Mr. Missere, who has

been a Chartered Accountant since 1972, is a certified accountant with a public accounting licence under the *Public Accountancy Act*, R.S.O. 1980, c. 405. We found Mr. Missere to be a candid and credible witness, whose evidence we accept without hesitation or reservation.

7. The terms under which Dunwoody was engaged are summarized in the following letter from Dunwoody to the Union:

It is desirable to have a clear understanding of the terms of our engagement as auditors for the Union. In this regard, we are summarizing our understanding of these terms for *the year ending September 30, 1982*.

Our statutory function as auditors of the Union is to report to the members whether the annual financial statements present fairly the financial position and results of operations. To meet this obligation and in accordance with what is now generally accepted auditing practice in Canada, our audit will include an examination of the accounting system, internal controls and related data. Our assessment of the reliability of the accounting system and internal controls will affect the extent of our audit work.

Because the audit examination will be planned and conducted primarily to enable us to express a professional opinion on the annual financial statements, it will not be designed to identify and cannot necessarily be expected to disclose defalcations and other irregularities. Of course, the discovery of irregularities may still result from our examination and should any significant ones be encountered, they will be reported to you.

In properly organized accounting systems, reliance is placed principally upon the maintenance of an adequate degree of internal control to prevent or detect irregularities. If we believe that it is desirable and practicable to make important improvements in the system of internal control, or if material irregularities are encountered by us during our audit, we shall bring these to your attention.

The foregoing comments deal only with our statutory obligation as the Union's auditors. We are always prepared to broaden our procedures, if feasible, at your request.

We will prepare the financial statements annually or as requested by you, in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding year, preliminary to the expression of an opinion thereon.

We will carry out such bookkeeping as we find necessary preliminary to the preparation of the financial statements, and generally perform any additional services as may, from time to time be arranged.

Fees will be determined on the basis of time spent on this engagement. Any disbursements, made on your behalf, will be added to the billing. Interest will be charged on unpaid accounts after thirty (30) days, at the rate of 1



1/2% per a month (18% per annum) and a 2% discount will be allowed on any accounts paid in full within 15 days from date of billing.

We shall be pleased to discuss the terms of the engagement with you at any time and to explain the reasons for any items.

If the above terms are acceptable to you and the services outlined are in accordance with your requirements, please sign the copy of this letter in the space provided and return it to us.

The above terms of our engagement as auditors shall remain operative until amended.

The President of Local 16, Tim Edwards, and Olgilvie Russell, who was at that time the Treasurer of the Local, signed a copy of that letter on behalf of Local 16. They also signed an identical letter provided by Dunwoody in relation to the audit for the six-month period ending March 31, 1983.

8. Dunwoody was also provided by the Local with the Canadian Union of Public Employees' standard written "Instructions to Outside Auditors Conducting Local Union Audits". After reviewing those instructions, Mr. Missere expressed the view that they were, for the most part, standard audit procedures which were already covered by Dunwoody's standard engagement letter (quoted in the preceding paragraph of this decision). However, he also stated that there were "things in there that . . . were not an auditor's job", such as "examination of all minutes to ensure proper order of business, including proper reading of motions and important information". He further testified, "The tests and procedures that we use [for the auditing] were up to our judgment. In order to be independent auditors that had to be the case."

9. The audits were performed by duly qualified members of the Dunwoody staff in accordance with generally accepted accounting procedures. After the working papers prepared by an articling student had been thoroughly examined by a supervisor, they were reviewed by a partner. There was then a review by a second partner in accordance with Dunwoody's internal requirements concerning "high profile audits".

10. Prior to the preparation of the Statements which form the subject matter of these proceedings, Camille Masse, an accountant in the employ of the Canadian Union of Public Employees ("C.U.P.E.") audited Local 16's books and financial records for the period from January 1, 1982 to January 31, 1983. The findings and recommendations which resulted from that audit (the "Masse audit") are contained in the following letter dated April 19, 1983 from Kealey Cummings, C.U.P.E. National Secretary-Treasurer, to Dianne Dumanski, Recording Secretary of Local 16:

Please be informed that Brother Cam Masse, Accountant, has recently completed an audit of the books and financial records of CUPE Local Union 16 for the period from January 1, 1982 to January 31, 1983. The following report outlines our findings and recommendations in the matter.

The audit encompassed complete verification of all 1982 and January, 1983 cancelled cheques, bank statements, receipts, ledger books, reading of Min-

utes, reviewing the local's existing By-Laws with recent amendments, miscellaneous documents and confirmation of funds in the local's various accounts.

In order to complete the audit, Brother Masse travelled to Sault Ste. Marie the week of February 6th, 1983. Some records were brought to Ottawa as the audit was incomplete and was finalized only this week. These records are being returned and entrusted into the care of Brother Russell on Saturday, April 23, 1983 by Brother Masse personally.

- (1) We found that your local union has presently bond coverage for the positions of President and Secretary-Treasurer in the amount of \$3,000.00 each.

*We recommend* that your local implement the following coverage immediately for the following positions:

President	\$6,000.00
Secretary-Treasurer	\$6,000.00
General Vice-President	\$3,000.00*

\*The third signing officer to execute his/her authority only when one of the other two signing officers are absent for lengthy periods of time, i.e. illness or vacation.

Upon receipt of your local's request for the above-mentioned amounts, we will immediately alter your bond coverage and invoice your local accordingly at a later date.

- (2) Our records indicate that the local union has last submitted a Trustees Report for the period ending March 31, 1982. In this regard, the local union is in violation of the CUPE Constitution. I refer you specifically to Articles B.3.10 and B.3.11 which state:

"B.3.10 The Trustees shall audit the books of the Secretary-Treasurer and shall exercise general supervision over the property of the Local Union. At the first election of officers in a Local Union the Trustees shall be elected so that one shall serve for a period of three years, one for two years and one for one year. Each year thereafter the Local Union shall elect one Trustee for a three-year period or, in the case of vacancies occurring, elect Trustees to fill only the unexpired terms in order to preserve overlapping terms of office.

"B.3.11 The Trustees shall examine the books and records of the Secretary-Treasurer and inspect or examine all properties, bonds, and all other assets of the Local at least half yearly or every six months, and shall report to the next regular meeting of the Local Union following the end of each half year on the condition of the funds and accounts, the number of members in good standing, the number initiated, expelled or suspended, admitted or withdrawn, together with such other

information they may deem necessary to the efficient and honest administration of the Local Union. They shall transmit a copy of such report to the National Secretary-Treasurer of the Canadian Union.”

We trust that the Trustees Reports for the periods ending September 30, 1982 and March 31, 1983 will be forthcoming.

- (3) We have received your February, 1983 per capita tax submission on March 29, 1983. This is to inform you that your local’s per capita tax payments are presently one (1) month in arrears. *We urge and recommend* that these arrears be eliminated as soon as possible and that your local union remain current in this matter.

In this regard we refer you to the CUPE Constitution which states:

“Article B.4.5 — The initiation fees, per capita tax and other obligations owed by the Local Union to the Canadian Union shall constitute a preferred claim and must be paid promptly by the Local Union each month prior to the payment of any other obligation of the Local Union.”

and Article 9.2(m) — “Any organization which does not pay its per capita tax on or before the time specified shall be notified of that fact by the National Secretary-Treasurer of the Union. Any organization three months in arrears in payment of per capita tax may be suspended from membership in the Union and can be reinstated only after arrears are paid in full.”

On the subject of per capita tax, please be informed that the audit concluded that the local union is reporting its membership accurately.

- (4) In the area of the local union’s By-Laws, please be informed of the following comments and recommended changes where applicable:
  - i) Section 3, 2nd paragraph — *We recommend* a change in the quorum *from* twelve (12) members in good standing plus three (3) table officers *to* twenty-five (25) members in good standing plus three (3) table officers.

Furthermore, *we recommend* that you delete the remaining portion of this paragraph (the following sentence) as we believe it to be unadvisable to authorize (5) five executive officers to enact the regular business of the local union when a quorum of the general membership has not been established.

We are of the opinion that the alteration to the number of members necessary to obtain a quorum is more appropriate taking into consideration the size of your membership of approximately 600 members.

- ii) Section 6 — 2nd paragraph: *We recommend* that you add the



following: The General Vice-President shall only be authorized to act as a signing officer when one of the other two signing officers are absent for lengthy periods of time, i.e. illness or vacation.

- iii) Sections 9 and 10: *Change the appropriate sentences* in the respective Sections to read — The Recording Secretary/the Secretary-Treasurer shall be empowered, with the approval of the *Membership*, to employ such stenographic or other assistance as . . . . etc.
- iv) Section 13: *We recommend* that you alter the last sentence in the first paragraph to read: All bills paid and business transacted by the Executive Board during this period shall be reported and ratified at the regular September membership meeting.
- v) Section 14: *We recommend* you replace paragraphs 6, 7, 8, 9 and 10 to read:

The local union recognizes that expenses are incurred by the committee members in the course of union business. In order to compensate for in-town transportation expenses, parking, sundries, coffee and occasional meals, a per diem expense of the amount of \$10.00 will be allowed and paid upon receipt of a detailed expense voucher by the Secretary-Treasurer of the local union at a regular union meeting.

- vi) Section 16 — 4th paragraph: *We recommend* that you *add* the following: as submitted by the employer by proper invoice.
- vii) Section 22 — 2nd paragraph: *We recommend* you *add* to the sentence — and reported to the membership.
- viii) Section 16 — 2nd paragraph: *We recommend* you change this paragraph to read: Delegates elected to any convention or seminar shall be paid transportation expenses of the most economical mode, i.e. air, rail or automobile dependent on circumstances and as incurred. Mileage incurred on union business shall be reimbursed at the rate of thirty-five (35) cents per mile. An effort will be made to double up in automobiles if feasible. Also, receipted hotel accommodation will be reimbursed as incurred, and a per diem of \$38.00 will be paid for each day out-of-town and an amount equal to any loss of wages necessitated by attendance at the convention or seminar.

The Treasurer shall inform the Executive of the current state of finances and the Executive will make its recommendation to the membership for approval on the mode of transportation, accommodation, number of days involved dependent on the information supplied by the Treasurer.

- 5) We note that the local is very active in the area of attendance at schools, conferences, seminars and conventions. We commend the local for its active involvement in aspects of CUPE and the Trade Union movement in general and we wish to encourage you to remain as active as your finances permit.
- 6) We recommend that at no time and for any reason blank cheques be pre-signed as this only leads to possible abuse of the local's funds.
- 7) In general, we found the books and financial records to be kept in very good order. We recommend, however, that an expense voucher be completed for each and every expense, excluding per capita tax and affiliation fees remittances. We also recommend that the expense vouchers be more detailed, that they make better reference to reasons for the expenditure and to the appropriate cheque number.
- 8) We have estimated your local's Net Worth as at January 31, 1983 to be as follows:

Plan 24	\$ 6,022.80
Share Account	1,315.62
Term, Deposits	15,000.00
Current Account	<u>2,700.00</u>
<u>Total Liquid Assets:</u>	\$25,039.01
Shares in Union Hall:	<u>4,000.00</u>
<u>Total Assets:</u>	\$29,039.01
Loan Payable:	4,705.07
<u>Net Worth</u>	<u>\$24,333.94</u>

The foregoing excludes any Office Equipment Assets.

In this matter, we strongly recommend that you dispose of the Loan Payable in the amount of \$4,705.07 immediately to eliminate further interest expense.

- 9) The audit discovered that contrary to the local union's by-laws, lost time was directly paid to certain members from the local's Treasury. While we concur that vacation time should be reimbursed, we find it improper that wages be paid to members for weekends and "overtime". Although no provision is found in the local's by-laws we nevertheless

discovered lost wages to have on occasion been paid at the rate of time and one-half.

Discrepancies in this matter are detailed as follows:

- i) July 16, 1982, Margaret Hammond, 8 hours @ 1-1/2 while on vacation. On the same voucher is found a duplicate payment for July 16th, 1982 resulting in this day being paid at double time and one-half = \$158.40.
  - ii) June 19, 1982, Margaret Hammond, 4 hours @ 1-1/2 = \$48.00
  - iii) June 30, 1982, Chester Edwards, 3 hours @ 1-1/2 = \$45.00
  - iv) August 26, 1982, William Shepherd, 7-1/2 hours = \$72.60
  - v) August 17, 1982, William Shepherd, 6 hours = \$58.68.
  - vi) August 20, 1982, William Shepherd, 6 hours = \$58.68.
  - vii) August 17, 1982, Chester Edwards, 6 hours = \$60.42.
  - viii) August 20, 1982, Chester Edwards, 6 hours = \$60.42.
  - ix) August 26, 1982, Chester Edwards, 7-1/2 hours = \$75.53
  - x) May 24, 1982, William Shepherd, 8 hours x \$9.70 = \$77.60.
  - xi) April 13, 1982, C. Edwards, 3-1/2 hours while on vacation but at time and one-half = \$45.12.
  - xii) April 7, 1982, C. Edwards, 3-1/2 hours while on vacation but at time and one half = \$45.12.
- 10) While conducting a cursory review of the expense vouchers, the audit found some 53 vouchers that either omitted proper details, i.e. reason for expense, number of miles claimed for mileage expense or did not have proper and normally required receipts attached.

In this matter, *we recommend* that all expense vouchers be properly detailed with receipts where applicable in order to provide a complete and accurate accountability of expenses.

It would be a horrendous task to detail in this report all 53 vouchers; we have therefore listed in the following a few examples chosen at random which we trust properly illustrates our concern in this matter.

- a) July 26, 1982, C. Edwards: car transportation, gas, etc. \$31.00. This voucher lacks detail. How many miles and for what purposes was this mileage claimed?



- b) November 6, 1982, Sharon Russell: typing \$20.00. This voucher again lacks detail. Typing what and for how many hours, etc.?
  - c) October 2, 1982, A. Heskett: donuts for union meeting, \$24.40. We were unable to find a receipt attached to the voucher in this matter.
  - d) May 1, 1982, Patricia Shepherd: Correspondence, Xerox, Stamps, typing, etc., \$23.90. This voucher obviously requires further detail. We were unable to find a receipt for stamps. What correspondence, how many Xerox copies, for what purpose, at what price? Typing what?
  - e) We found that many of the past table officers would consistently charge \$13.00 per month for gasoline without substantiating their mileage.
- 11) The audit discovered an unusually high amount of restaurant and bar charges paid by the local union (and incurred by members of the past Executive). The totals in this matter are outlined in the following:

Rico's Restaurant	\$ 157.33
Canadian Motor Hotel	32.45
Cesina's	<u>1,822.56</u>
Total:	<u>\$2,012.34</u>

We were unable to find any details outlining the reasons for this large expenditure of the local union funds. We find the total to be abusive and excessive. We are of the opinion that this conduct can only be described as mismanagement of the local's funds.

To this end, *we recommend* that this type of expenditure cease immediately.

We wish to point out that we found a number of letters addressed to the past President and to the restaurant in question from Brother Russell requesting that this practice stop.

We therefore cannot hold Brother Russell responsible for these transactions.

We trust that the foregoing recommendations will be read, discussed and adopted by the membership of CUPE Local 16 at the April 23, 1983 Special Meeting.

Please communicate with this office if further assistance or clarification is required in these matters.

Mr. Missere was aware of that internal audit and of Mr. Masse's recommendations at the time that the Statements in question were being prepared by Dunwoody.

11. The Statements prepared by Dunwoody for the year ending September 30, 1982, consist of a title page, an Auditors' Report, a Balance Sheet, a Statement of Operations, and certain "notes" to the Statements. The Auditors' Report reads:

TO THE MEMBERS  
CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 16

We have examined the balance sheet of Canadian Union of Public Employees, Local 16 as at 30 September 1982 and the statement of operations for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

Because of the lack of proper documentation in regards to certain expenditures (conventions and seminars — \$11,415, executive and committee expenditures — \$16,251), we were unable to satisfy ourselves that these expenses were properly recorded in the records of the Union.

In our opinion, except for the effect of adjustments, if any, had we been able to satisfy ourselves with respect to the above-mentioned expenditures, these financial statements present fairly the financial position of the Union as at 30 September 1982 and the results of its operations for the year then ended in accordance with accounting principles described in note 1 to the financial statements.

18 October, 1983Dunwoody & Company  
CHARTERED ACCOUNTANTS

12. The Balance Sheet for the year ending September 30, 1982 is as follows:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 16

BALANCE SHEET  
AS AT 30 SEPTEMBER 1982  
ASSETS

CURRENT		
Cash	\$ 7,422	
Short term deposit receipts	15,000	
Accounts receivable	4,894	\$27,316
LONG TERM INVESTMENT, notes 1 and 2		<u>2,717</u>
		<u>\$30,033</u>

## LIABILITIES

## CURRENT

Bank loan, note 3	\$ 6,405	
Accounts payable	<u>7,831</u>	\$14,236

NET ASSETS AS REPRESENTED  
BY ACCUMULATED EXCESS OF  
REVENUE OVER EXPENDITURE

15,797  
\$30,033

## COMPARATIVE FIGURES, note 4

On behalf of C.U.P.E., Local 16

.....  
.....

13. The Statement of Operations for that period reads:

## CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 16

STATEMENT OF OPERATIONS  
FOR THE YEAR ENDED 30 SEPTEMBER 1982

## REVENUE

Union dues	\$76,451	
Interest	<u>3,267</u>	\$79,718

## EXPENDITURES

Committees and Executive		
Honoraria	9,914	
Other	16,25	
Convention and seminars	11,415	
Flowers, wreaths, gifts, dances, etc.	6,354	
Interest and bank charges	248	
Office supplies and services	2,215	
Professional fees	2,000	
Telephone	413	
Union membership fees and dues	<u>46,357</u>	<u>95,167</u>
LOSS FOR THE YEAR		(15,449)
Accumulated excess of revenue over expenditure, beginning of year		<u>31,246</u>
ACCUMULATED EXCESS OF REVENUE OVER EXPENDITURE, END OF YEAR		<u>\$15,797</u>



14. The Dunwoody staff attempted to break down into greater detail the \$11,415 "Conventions and seminars" expense, and the sum of \$16,251 listed under "Other" expenditures in respect of "Committees and Executive". However, as indicated in the second paragraph of their report and confirmed by Mr. Missere's testimony before the Board, they were unable to do so because of lack of proper documentation. While it was possible to conclude from the Union's financial records that portions of those sums were allocable to a particular committee or other category, it was not possible for the Dunwoody staff to satisfy themselves that those portions were the only expenditures pertaining to that committee or category, as there were a number of expenditures which could not be allocated to any particular committee or category due to a lack of proper supporting documentation such as receipts and vouchers. Consequently, in the exercise of their professional judgment and expertise, they decided not to include those categories in the Statements.

15. The following notes were also attached to the Statements for the year ending September 30, 1982:

## CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 16

### NOTES TO FINANCIAL STATEMENTS 30 SEPTEMBER 1982

#### 1. SIGNIFICANT ACCOUNTING POLICIES

##### (a) Income and Expenses

Revenues and expenses are recorded on an accrual basis.

##### (b) Long Term Investments

Local 16 has a 20% interest in the C.U.P.E. building on Salisbury Avenue. These financial statements reflect only Local 16's portion of the expenses related to this building.

##### (c) Fixed Assets

Fixed assets, consisting of office fixtures and furnishings which tend to be relatively minor and to have short economic lives are fully expensed in the years of acquisition.

#### 2. LONG TERM INVESTMENTS

Partnership interest in the  
Local Union Building,  
at cost \$2,717

#### 3. BANK LOAN

The bank loan is a demand note and requires monthly payments of \$652, including interest of 19%. It is fully secured by term deposits.

#### 4. COMPARATIVE FIGURES

There were no financial statements available for comparison purposes.

16. The Statements for the six-month period ending March 31, 1983 are similar in form. However, the Auditors' Report for that period does not contain any "qualification", such as that set forth in the second paragraph of the Auditors' Report for the year ending September 30, 1982 (as quoted above). Thus, the final paragraph of the Auditors' Report for that six-month period reads:

In our opinion, these financial statements present fairly the financial position of the Union as at 31 March 1983 and the results of its operations for the six months then ended in accordance with accounting principles described in note 1 to the financial statements, applied on a basis consistent with that of the preceding year.

17. In the Statements for the six-month period ending March 31, 1983, the amount specified in the Statement of Operations for "Convention and seminars" expenditures is \$661, out of total expenditures of \$44,250. The "Committees and Executive" expenditures included in that statement are:

Honouraria	\$5,104
Other	4,617

In his testimony before the Board, Mr. Missere stated that the "Convention and seminars" and "Other" expenditures were not deemed by Dunwoody to be sufficiently material to "qualify" the report for that period. He also testified that the lack of documentation was less material in respect of that six-month period than the previous twelve-month period. It was also his evidence that those two sums were listed in that fashion in the Statement of Operations for the six-month period ending March 31, 1983 for comparative purposes.

18. When the Statements had been completed, Mr. Missere met with the trustees and members of the Executive of Local 16 in late November of 1983 to review the Statements and the recommendations which he planned to set forth in a "management letter". It was the consensus at that meeting that Mr. Missere would present the Statements to the membership at the December 3, 1983 general membership meeting, and that if there was a request for further information, it would be provided at the January 9, 1984 general membership meeting. At least one of the reasons for proceeding in that fashion was that the complainant had been pressing Mr. Jordison and other Union officials to expedite the preparation and release of the Statements.

19. Pursuant to that arrangement, Mr. Missere attended the Union's general membership meeting on December 3, 1983 to present to the membership the Statements which had been prepared under his supervision. At that meeting members asked Mr. Missere a number of questions about the Statements and the Local's finances during the period covered by them. Mr. Missere was able to answer some of those questions immediately. For example, in response to the complainant's question, "Was the bank loan made without proper authorisation?", he replied, "Yes, as the loan had already been made prior to requesting authorization." The complainant also asked, "Did you find in your records anywhere that it cost this Local \$2000 when [the complainant] charged Brother R. Russell for misrepresentation or \$5000 to have

Brother Jim Anderson come up to investigate possible trusteeship?" Mr. Missere replied in the negative, and advised the complainant that those costs were "not specifically noted". When the complainant asked the cost of the Dunwoody audit, Mr. Missere indicated that the cost to that point in time was between \$3500 and \$4000. He also noted that a "normal audit without searching for information would cost roughly \$1000 or under", and that the substantially higher cost reflected the inadequate state of the Local's financial records, and the lack of internal controls which made it necessary for Dunwoody to examine more documentation than would normally be necessary.

20. At the December 3rd meeting, Mr. Missere was asked by member Della Rahn for a breakdown of the expenditures listed under "Convention and seminars" and under "Other" in respect of "Committees and Executive" expenditures. However, he was unable to provide details of those expenditures at that meeting because he did not have with him the "working papers" prepared by his staff in carrying out the audit. In an attempt to provide at least a partial breakdown of the expenses in question, Mr. Missere agreed to provide the Union with a photocopy of the working papers concerning those expenditures. When the complainant asked how soon those figures could be made available, Mr. Missere told her that he could provide them by the following Monday. However, Mr. Jordison then stated that no facts or figures would be released to the membership without first being reviewed by the Executive of the Local. Mr. Jordison took that approach because he was of the view that the Executive of the Local was entitled, as a matter of fairness, to consider and examine the working papers prior to their presentation to the membership. However, the complainant and some of the other members of that sorely divided Local viewed it as an attempt to frustrate their desire to obtain further information concerning the Union's finances during the period in question. Consequently, the complainant proceeded to file the instant complaint with the Board (on December 14, 1983) without waiting to receive the working papers.

21. At the December 3rd Union meeting, Mr. Missere outlined some of the deficiencies in the Local's accounting practices which had been noted during the audit. He also indicated that he would be providing Local 16 with a "management letter" describing those deficiencies and recommending methods of eliminating them. Accordingly, Mr. Missere subsequently provided Local 16 with the following "management letter", in which he formally drew the Union's attention to various deficiencies in its accounting practices and made specific recommendations for improvement:

In accordance with our usual practice, we set out below certain matters concerning the Union's accounting practices which came to our attention during our recent work in connection with the audits for the periods ending 30 September 1982 and 31 March 1983 and our recommendations for improvement.

## 1. DISBURSEMENTS

The system of cash disbursements requires more control measures. At present, the treasurer is responsible for approving payment of invoices and all other disbursements and also for actually issuing the cheques. The Union membership approves the disbursements after they have already been made, at their monthly meetings. Double signatures are required but the cheques are signed with a stamp which has both



required signatures on it. This system does not provide for adequate control over cash disbursements.

Approval of expenditures should be formalized to prevent the possibility of error and abuse. As each invoice is received it should be stamped. The stamp should indicate at least the following:

Date Received  
 Quantity checked  
 Prices checked  
 Extensions checked  
 Allocation  
 Approved by  
 Paid — Cheque #  
       — Date

All payments (except petty cash disbursements) should be approved by the Executive Board prior to disbursement.

If the Union continues to use a signature stamp for signing cheques, then each required signature should be on a separate stamp and kept and used only by the proper individual.

At present, payments are being made without adequate documentation. Every disbursement should be adequately documented, prior to approval to ensure that Union funds are not being misallocated.

For example, expense vouchers are not being completed for every reimbursement made to Union members. When expense vouchers are completed, they are often incomplete and receipts are seldom presented. Since members are not being required to prove that they actually made purchases or that the purchases were related to Union business, it is possible that the system could be abused.

Expense vouchers should be completed for every reimbursement made and detail should be provided. That is, the voucher should include the date of/reason for/amount of expense. Receipts should be attached and the voucher should be properly approved prior to payment. In cases where per diem amounts are allowed, proper documentation would include a pre-printed form, which would indicate the reason for the expenditure, the appropriate dates and the necessary approvals.

In the case of Cesira's Restaurant, overpayments have been occasionally made because the treasurer has based some payments on invoices received, and some payments on statements received. These overpayments have been brought to the attention of the treasurer by the restaurant; however, had the restaurant failed to do so the double payments may have gone unnoticed by the Union.

If payments are to be made based on statements received then the

invoices listed on any statement should be matched and attached to that statement to prevent double payment. Payments should be made consistently on the basis of invoices received *or* statements received but not both.

If union dues rebates are to be paid in the future, a copy of the member's T4 slips, showing the total union dues paid, and a copy of the yearly attendance records should be kept on file. As well, the Union should consider the income tax implications of this rebate.

Payments made to the school boards re lost time are also not adequately documented. The Union is invoiced by the school boards for any time missed by any union member with respect to Union business (except time lost due to meetings with the board). At present, the treasurer is responsible for approving these invoices, which he does on the basis of his knowledge of the activities of all Union members.

If possible, in future, the Union should receive a copy of the authorization for lost time signed by a member's supervisor. Properly completed this authorization should give the date of and reason for absence from the job. The invoices from the school boards should be matched to these authorizations prior to approval and payment. This measure would ensure that the Union is paying only for lost time due to legitimate Union business.

## 2. FILING SYSTEM

The present filing system is inadequate. Paid invoices should be kept separately from invoices payable. The form of the filing system can be kept simple, with invoices being kept in files according to purpose of expense (lost time, conventions and seminars, etc.), the most recent payments to the front of the file. Cheque stubs from receipts should also be filed separately. As previously mentioned, documentation for all disbursements should be acquired, and kept on file. This will provide evidence that payments have been made and what the payments were for. A well organized filing system will reduce the risk of double payments and provide protection to the individuals responsible for making the disbursements.

## 3. GENERAL

Although the Union membership is quite large, a few people seem to be on numerous committees and carrying the majority of the work load and responsibility for the Union. As recommended in the C.U.P.E. Constitution, the responsibilities should be more widely disbursed. Per the National Office recommendations, the quorum should be increased and five executive officers should not be able to enact union business when a quorum is not present.

Several instances have occurred of the union being committed to

financial arrangements with neither Executive Board approval nor quorum approval. For instance, there is no motion carried to approve the bank loan, or the rolling over of term deposits. Lack of approval for other unusual purchases and commitments is also noted. As previously mentioned authority should be disbursed; however whatever the union decides with regard to quorum and Executive Board enacting Union business, the by-law must be adhered to.

#### 4. TREASURER REPORTS AND ACCOUNTING RECORDS

Also included in the National Office recommendations and in agreement with the C.U.P.E. Constitution, the Trustee's Report should be completed every six months. This report should be expanded to include all receipts and disbursements for the period and the opening and closing bank balances for each period. Approval of each report should be indicated by the signature of the President and Secretary of the Local.

#### 5. BUDGETS

The Union executive should be preparing budgets and comparing these budgets to actual operating results on a periodic basis. This procedure, if done properly, would help the Union to control various expenditures.

This report is not exhaustive and deals with the more important matters which came to our attention during the audit. We shall be pleased to discuss with you any matters mentioned in this report.

Yours very truly,

DUNWOODY & COMPANY

(signed) N. Donald Missere, C.A.

22. Mr. Missere mailed a number of working papers (prepared by Dunwoody staff during the course of the audit) to Mr. Jordison at the Local's office in Sault Ste. Marie early in the week following the December 3rd Union meeting. After they had been reviewed by the Executive of Local 16, those working papers were distributed to the membership by Mr. Jordison at the January 9, 1984 membership meeting. As a result of an oversight, the Dunwoody working paper concerning "Executive Expenses" was inadvertently omitted from the papers distributed to the membership at that meeting. The working papers that were distributed to the membership at the January 9, 1984 Union meeting provide several pages of details concerning the "Convention and seminars" and "Other" expenditures for the year ending September 30, 1982, including a number of details which would not generally be included in a financial statement. For example, they list specific payments to individuals in respect of conventions and conferences, and in respect of negotiations and grievance committee activities. They also identify a number of areas that cannot be particularized due to inadequate documentation, such as unreceipted expenses for typing, meals, and gasoline. Those working papers did not satisfy the complainant's desire for highly detailed information concerning the Local's expenditures during the period in question, not because of any inadequacy or defectiveness in



the working papers, but because (in the words of Mr. Missere), “the purpose of the working papers was not to list in detail all the expenditures for submission to the Union; its purpose was to give [Dunwoody] an overview of everything that was in the account so that [Dunwoody] could form an opinion as to whether the expenditures were actually made, and whether they were properly documented.”

23. In an attempt to satisfy the complainant’s desire for further information concerning the respondent’s expenditures during the period in question, the respondent agreed on February 21, 1984, with the encouragement of the Board, to permit the complainant to attend at Mr. Missere’s office to review all of the Union’s financial records from which the Statements were prepared by Dunwoody. Pursuant to that arrangement, the complainant attended at Mr. Missere’s office for a total of 27 hours, and reviewed all of that documentation. She was accompanied by John Clark, an individual with many years of experience in the labour movement, including some experience as a treasurer and recording secretary of a local of the United Steelworkers of America. Although the complainant was given unimpeded access to all of those financial records, and was also permitted to confer with Mr. Missere concerning them, she remained determined to press forward in an effort to obtain a Board order that the respondent prepare another audited financial statement containing more detailed information.

24. When Mr. Jordison, the C.U.P.E. National Representative, became aware that, through oversight, Dunwoody had not been provided with the (Local 17) Treasurer’s monthly reports for the period covered by the audit, he arranged to have them delivered to Mr. Missere near the beginning of May, with a request that Mr. Missere review them and advise whether or not they would affect the outcome of the audits. Mr. Missere subsequently examined those Reports and advised Mr. Jordison that the outcome of the audits would not be affected by them. In explaining that conclusion to the Board when he was called on September 13, 1984 to testify for a second time in these proceedings, Mr. Missere stated that for a proper audit to be conducted, the working papers for the audit have to be prepared on the basis of information obtained directly from the Local’s registers and cash books, not from the Treasurer’s monthly reports.

25. The complainant and her representatives contend that the financial statements for the year ending September 30, 1982 are inadequate because they do not contain a sufficiently detailed breakdown of expenditures. However, we accept Mr. Missere’s evidence that lack of proper documentation of the type described in his “management letter” made it impossible for Dunwoody to be sufficiently satisfied of the accuracy and completeness of the sums allocable to specific areas of expense to include such a breakdown in the audited statements, despite their best efforts to do so. Thus, what is inadequate in the present case is not the financial statements, which were carefully prepared and audited by a reputable and experienced chartered accounting firm in accordance with generally accepted accounting principles, but rather the Union’s financial records themselves.

26. Mr. Clark and the complainant suggested in their evidence that by referring to ledger entries, cancelled cheques, and other Union records, they were able to break down in a more detailed manner the expenses aggregated under “Convention and seminars” and “Other”. However, neither Mr. Clark nor the complainant is a Chartered Accountant or a person licensed under the *Public Accountancy Act*, and neither of them is qualified to give expert testimony of the type necessary to refute Mr. Missere’s expert evidence in this regard. Moreover, Mr. Clark conceded in his submissions on behalf of the complainant that it would not be possible to prepare an “audited” or “certified” financial statement with such a breakdown in the

circumstances of this case, due to the aforementioned lack of proper documentation. Nevertheless, he suggested that an uncertified, partial breakdown could be prepared in this fashion. While that may well be true, a breakdown of that type is neither contemplated by section 85(2) of the Act, nor within the Board's jurisdiction to order under that provision.

27. The complainant's representatives further contend that the Statements are inadequate because they do not include certain items, such as the Union's public address system and typewriters, as assets. However, as indicated in Note 1(c) to the Statements, assets of that type are not included in the Balance Sheet because they are fully expensed in the years of acquisition. In this regard, we accept Mr. Missere's uncontradicted evidence that fully expensing such items in the years of acquisition is a normal accounting procedure for non-profit organizations such as the Local. Thus, we are satisfied that the fact that such items are not listed in the Balance Sheet does not render the Statements inadequate.

28. The complainant's representatives also rely upon Articles B.3.10 — .12 of Appendix "B" to the C.U.P.E. Constitution. Those Articles provide as follows:

#### Trustees

B.3.10 The Trustees shall audit the books of the Secretary-Treasurer and shall exercise general supervision over the property of the Local Union. At the first election of officers in a Local Union the Trustees shall be elected so that one shall serve for a period of three years, one for two years and one for one year. Each year thereafter the Local Union shall elect one Trustee for a three-year period or, in the case of vacancies occurring, elect Trustees to fill only the unexpired terms in order to preserve overlapping terms of office.

B.3.11 The Trustees shall examine the books and records of the Secretary-Treasurer and inspect or examine all properties, bonds, and all other assets of the Local at least half yearly or every six months, and shall report to the next regular meeting of the Local Union following the end of each half year on the condition of the funds and accounts, the number of members in good standing, the number initiated, expelled or suspended, admitted or withdrawn, together with such other information they may deem necessary to the efficient and honest administration of the Local Union. They shall transmit a copy of such report to the National Secretary-Treasurer of the Canadian Union.

B.3.12 Where a Local Union hires the services of a qualified accountant or accounting firm, the auditing of the Local Union's books shall be done in accordance with the procedures outlined in Article B.13.11 of this Constitution.

In particular, they submit that the Statements are inadequate because Dunwoody did not audit the Union books completely in accordance with the procedures outlined in Article B.3.11.

29. Assuming without deciding that a trade union's constitution may in some instances be of relevance in determining the adequacy of its financial statements in the context of section

85(2) of the Act, we are of the view that the constitutional provisions quoted above do not assist the complainant's case. While it is true that Dunwoody did not report to the Local on such matters as "the number of members in good standing" and "the number inducted, expelled, or suspended, admitted or withdrawn", this does not in our view make the Statements prepared by Dunwoody inadequate within the meaning of section 85(2), in the circumstances of this case. The complainant did not suggest that she was unaware of that information. Moreover, the Masse audit's finding that "the local union is reporting its membership accurately" was not disputed by any of the witnesses who testified before us in these proceedings. There was also no evidence adduced that contradicts or renders unreasonable Mr. Missere's evidence that "as an independent outside auditor, [he] cannot act as a trustee". Mr. Missere further testified as follows (during cross-examination on November 14, 1984): "I cannot put myself in the position of a trustee. I am an independent auditor and I have to maintain my independence". Having regard to the totality of the evidence, we are satisfied that Dunwoody did comply with the provisions of Article 3.10 — .12 of the C.U.P.E. Constitution in all material respects. In particular, we find that through the Statements and the "management letter", Mr. Missere reported to the membership of Local 16 on the condition of its funds and accounts, together with all of the other information which he, in the exercise of his professional judgment, deemed necessary for the efficient and honest administration of the Local.

30. The complainant's representatives also question the adequacy of the Statements on the basis that they make no reference to "petty cash". However, having regard to all of the evidence, we find that the occasional use of the term "petty cash" in the Union's financial records is a misnomer, as no "petty cash" fund exists in the sense in which that term is generally used for accounting purposes. Mr. Missere described such a fund in the following terms: "You have \$100 cash, or vouchers on hand to support that, at all times. Every once in a while you reimburse the petty cash fund for the vouchers that you have on hand." By way of contrast, it is evident from the testimony of Olgilvie Russell that the term "petty cash" was used by him in the Union's financial records to describe funds advanced to a Union committee chairperson to cover future meal expenses, because, in his view, the money became "petty cash" in the hands of the committee chairperson, to be used to purchase meals for the committee.

31. It is abundantly clear from the evidence that Local 16 has been in a state of turmoil for several years. Various complaints have been filed with the Board by or on behalf of the present complainant and her friend, Glenna Davey (who is the wife of Terry Davey, one of the complainant's two representatives in the present case), and there have also been a number of internal Union proceedings. The primary matter which prompted the complainant to institute proceedings concerning financial reporting within the Local was her concern about the inaccuracy of statements by Clarence Dungee, a C.U.P.E. National Representative formerly assigned to service Local 16, and Olgilvie Russell, a former Treasurer of Local 16, that those earlier proceedings were "breaking the Local". Messrs. Dungee and Russell also told the membership that it had cost the Local \$5000 to have Jim Anderson come up to investigate possible trusteeship, and that it might cost the Local as much as \$25,000 depending on how far Glenna Davey wanted to proceed with the matter.

32. When Mr. Russell told the membership at a meeting of the Local in September of 1982 that Local 16 "was broke because of the expenses of the 'Davey case'", the complainant asked Mr. Russell to provide a "financial report of every cent that was spent on the 'Davey case'". When that report was not forthcoming, the complainant persisted in her request by visiting Mr. Russell at his residence, raising the matter at Union meetings, and writing to an assistant to the President of C.U.P.E. That letter, which also complained about members of



the Executive “spending money on alcoholic beverages and fancy restaurants”, resulted in the President’s assistant going to Sault Ste. Marie to investigate the matter. Thereafter, the President directed Mr. Masse to audit the books of Local 16. Since the information which the complainant was seeking with respect to the precise cost of the “Davey case” was not contained in the Masse audit, she continued to demand that it be provided to her.

33. In February of 1983, the complainant filed a complaint with the Board under section 85 of the Act, alleging that Local 16 had failed to furnish her with a copy of the audited financial statement of its affairs to the end of its last fiscal year (Board File No. 2293-82-M). That complaint was withdrawn (by leave of another panel of the Board) when Local 16 agreed to retain Dunwoody to prepare the Statements which form the subject matter of the present proceedings. (The complainant also charged Mr. Russell under the C.U.P.E. Constitution for failing to maintain adequate control over the Local’s finances and for disseminating inaccurate information concerning the costs incurred by the Local in respect of the “Davey case”. After Mr. Russell was found guilty by a trial committee, he appealed to the National Executive Board. That appeal was still pending at the time when this evidence was adduced before the Board).

34. After Mr. Jordison was assigned to replace Mr. Dungee as the C.U.P.E. National Representative in respect of Local 16, he attempted to alleviate the concerns of the complainant and Mrs. Davey by publicly stating that the “Davey case has not broken the Local”, and by urging them to “forget the past” and concentrate on improving the current situation within the Local. However, that approach has not met with success, as evidenced by the complainant’s strong determination to proceed with the present case, notwithstanding the fact that the Union has permitted her to thoroughly review all of the Union’s financial records from which the Statements were prepared by Dunwoody, and notwithstanding the fact that the Board indicated more than once during the course of these proceedings that it was far from apparent that the proceedings were serving any useful purpose in view of the fact, which was evident from the initial day of hearing, that inadequate documentation had prevented and would continue to prevent Dunwoody (or any other licensed accountant) from preparing or certifying an audited financial statement containing particulars of the type desired by the complainant concerning the Local’s expenses for the period in question.

35. It is clear that even if the preparation of more detailed financial statements were not precluded by a lack of adequate documentation concerning various expenses of the Local during the period in question, no such statements in a form of the type identified by Mr. Missere as being in accordance with generally accepted accounting principles would satisfy the complainant, as the highly detailed breakdown of expenditures which she desires would not be included in any such statement. As the Board wrote in *Murray G. Strong*, [1981] OLRB Rep. July 901, at paragraph 14:

... A financial statement is a statement of net assets and a summary of income and expenses of a particular operating entity and does not set forth the minutiae of details of the source and origin of every cent which is received and disbursed. This minutiae of details is to be found in the vouchers and bank statements of an operating entity. ...

36. The Masse and Dunwoody audits have been of considerable assistance to Local 16 in revising its accounting procedures and attempting to place its financial affairs in order. Many of Mr. Masse’s and Mr. Missere’s recommendations have been implemented. For example, detailed expense vouchers, with receipts attached where appropriate, are now completed for

every expenditure and detailed records are maintained with respect to "lost time" payments. Expenditures (other than those expressly provided for in the C.U.P.E. Constitution or Local 16 By-laws, such as per capita payments by the Local to C.U.P.E.) are not made until after they have been considered by the membership at a Union meeting and approved by motion. The use of a signature stamp for signing cheques has been eliminated. The Union's filing system has been improved by Barbara Edwards, the current Treasurer of the Local, with the assistance of Mr. Missere. There is nothing in the evidence which suggests that further improvements would be likely to result from the preparation of additional audited financial statements for the period in question, or that the preparation of such statements would serve any other useful purpose in the circumstances of this case.

37. For all of the foregoing reasons, this complaint is hereby dismissed.

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**2319-84-R Pat Steele, Applicant, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, Respondent, v. Canada Trustco Mortgage Company, Intervener**

**Practice and Procedure — Termination — Newly certified union completing six months since commencement of strike — One year not expired since certification — Protection of newly certified union for one year minimum given by Act — Not shortened by operation of S.61(3) — Termination application untimely**

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members J. Wilson and B. L. Armstrong.

**APPEARANCES:** *Ian S. Campbell for the applicant; J. Cameron Nelson and Marianne Turner for the respondent; Steven L. Moate and Danny Menard for the intervener.*

**DECISION OF THE BOARD;** January 14, 1985

1. This is an application for termination of bargaining rights filed on November 8, 1984.
2. The respondent was certified as bargaining agent for all full-time employees with certain exceptions of the respondent at Cambridge, Ontario, on January 5th, 1984, and following breakdown in bargaining a legal strike commenced March 22, 1984.
3. At the hearing the respondent raised as a preliminary objection that the application was prematurely made inasmuch as one year had not run from the time of certification to the date on which the application was filed, as is provided for in section 57(1) of the Act. The applicant argued that the one year provision of section 57(1) was modified by section 61(3)(a) of the Act to permit the filing of an application after six months have elapsed after the commencement of the strike.
4. After hearing representations from all parties, the Board concluded that the one year of protection accorded to a newly certified union by section 57(1) is a minimum period of

protection accorded to a newly certified bargaining agent and that such period cannot be shortened as a result of the operation of section 61(3). In so concluding the Board adopted the reasoning in the decision of *Ali v. Local 2078 U.A.W. v. Ontario Hospital Association*, [1980] OLRB Rep. July 1036.

5. The application was accordingly orally dismissed as premature.

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**3077-83-R** Locals 1316 and 1946 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Candesco (1978) Ltd.**, 551067 Ontario Limited carrying on business as Interspace Interior Contracts and ECI Ltd., Respondents

**Related Employer — Sale of a business — Company operating wood manufacturing plant going into receivership — Majority owner and minor shareholder commencing new business of design, consulting and cost estimating for clients — Sale nor related employer provisions applicable**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members S. Cooke and W. H. Wightman.

**APPEARANCES:** *D. McKee, Magnus Graham and Rick Harkness for the applicant; W. G. Posthumus, W. Guthrie and H. Karnotzki for 551067 Ontario Limited carrying on business as Interspace Interior Contracts and ECI Ltd., no one for Candesco (1978) Ltd.*

**DECISION OF THE BOARD;** January 4, 1985

2. The applicant has applied for relief under section 1(4) of the *Labour Relations Act*. In the alternative, the applicant has alleged that there has been a sale of a business within the meaning of section 63 of the Act. The applicant sought a declaration that the respondents are all one employer within the meaning of section 1(4) of the Act. The applicant further sought a declaration that there had been a sale of a business from Candesco (1978) Ltd. ("Candesco") to 551067 Ontario Limited carrying on business as Interspace Interior Contracts ("Interspace") and ECI Ltd. ("ECI"). The applicant further sought a declaration that Interspace is bound by the Carpenters' provincial collective agreement in the industrial, commercial and institutional sector of the construction industry.

3. William Guthrie is the president of Interspace and is also the president of ECI. Interspace was incorporated on May 5, 1984, and ECI was incorporated on January 10, 1984. Harold Karnotzki and William Guthrie are the sole directors and equal shareholders in Interspace and ECI.

4. In 1978, two corporations known as Candesco Interiors Limited and Span Design and Construction Limited were amalgamated to form Candesco. Mr. Guthrie was the majority shareholder in Candesco with his wife owning about one and a half per cent of the shares and Mr. Karnotzki owning about six per cent of the shares. Candesco operated a wood manufactur-



ing plant with its own employees and was also involved in general contracting of interiors of commercial premises. Sixty per cent of its interior work was in retail stores with the balance of the interior work in bars, hotels and restaurants. Mr. Guthrie and his wife co-signed for loans from the Royal Bank of Canada to Candesco. In April of 1983, Candesco was not able to meet its trade debts. The Royal Bank of Canada appointed a receiver and Candesco's business was liquidated. Candesco did not have sufficient assets to satisfy the Royal Bank of Canada, and Mr. Guthrie and his wife have been sued for a large amount of money. By 1983, Mr. Karnotzki had worked for Candesco and its earlier constituent entities for fifteen years. Candesco remains inactive and in receivership.

5. In 1983, Mr. Guthrie found himself in debt to the Royal Bank of Canada and with no means of income. He had to find a way to make a living. He approached Mr. Karnotzki and inquired if he would be interested in starting a venture in the field they knew best on the basis of being equal partners. Mr. Karnotzki was agreeable and the two men decided that the way to approach the new venture was to conduct their business on a consulting basis without having to be responsible for the payment of contractors. In this way they would not have any credit responsibilities because any credit involved would be the credit of the clients and suppliers. With these concerns and objectives in mind the two men commenced their consulting operations in May or June of 1983.

6. From the outset, Mr. Guthrie was very fortunate. A long time friend was building a restaurant at the Terminal Building on the waterfront in Toronto. The friend was aware of Mr. Guthrie's circumstances and the two men were given the job of designer and project manager for the restaurant in May or June of 1983. Their role was to design the project on behalf of the owner and their fees were to consist of three per cent of the budgeted cost of the design work and a management consulting fee of seven per cent of the total value of the project. They were to produce budgets and indicate costs based on their best experience. Eventually they were to manage the project and arrange for bids. They gave certificates for the work as it progressed so as to let the owner know how much to pay suppliers and contractors. The owner told them how much to spend and they prepared budgets showing the costs and how the project should be developed. Part of the responsibility of Interspace was to see how the job should be done and to ensure prices which were obtained. The owners would issue payments as the jobs progressed.

7. Interspace gave monthly statements to the owner and these statements served as the basis for draws to the contractors. The cheques were issued directly to the suppliers. Most of the suppliers have written contracts with the clients. While Interspace does not have any employees on the job, it does employ a secretary and a draftsman. The average value of a job undertaken by Interspace is between \$90,000 and \$100,000. Virtually all of Interspace's contracts have been performed on the basis of a fee of ten per cent for design and management. An exception has been made due to the relative smallness of a project. In the performance of a job in connection with a small clothing store in Brandon, Manitoba, Interspace received a cheque from the customer and disbursed the amounts due to the suppliers and contractors with an accounting of the monies to the client. On the latter job, Interspace informed the contractors that they were entering into contracts with the owners and that Interspace was the contract manager for the contracts. The contractors were informed that they would be paid by the owners through Interspace.

8. Mr. Guthrie and Mr. Karnotzki in January of 1984 found it necessary to use their own carpentry installation company when it was unable to find a suitable carpentry installation

company in its own field. ECI was established and then incorporated because they could not find a suitable contractor to install woodwork for interiors. ECI may perform work and have employees on the jobs managed by Interspace. On January 25, 1984, some two weeks after its incorporation, ECI entered into a voluntary recognition agreement with The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of the United Brotherhood of Carpenters and Joiners of America and its affiliated bargaining agent Local 1256 (the "Union"). In this agreement, ECI recognized the Union as the sole and exclusive bargaining agent of all journeymen and apprentice carpenters, other than millwrights, employed by ECI in the Province of Ontario and engaged in the industrial, commercial and institutional sector of the construction industry. ECI and the Union further agreed that the agreement constituted a voluntary recognition agreement under the *Labour Relations Act* and that ECI would be bound by the Carpenters' provincial collective agreement made between the Carpenters Employer Bargaining Agency and the Union. ECI did not know at the time of incorporation that it would be signing a collective agreement.

9. ECI has employed members of the United Brotherhood of Carpenters and Joiners of America under the terms of the provincial collective agreement on a number of projects, for example, in Sarnia and Hamilton. Interspace has operated on jobs with a supervisor who acts on behalf of the client. The persons who act as supervisors are self-employed persons who contract themselves out for such work and may perform carpentry work during the interior installations. The supervisors are paid by Interspace on behalf of the client at a rate of between twenty-two and twenty-five dollars an hour.

10. Candesco was bound to the Carpenters' provincial collective agreement and previously worked as an interior general contractor. A division of Candesco formerly engaged in design work but did not do consulting work. Candesco used to perform carpentry work under the terms of the Carpenters' provincial collective agreement and used to subcontract electrical and plumbing work and any other non-carpentry work required to perform a job.

11. Prior to the project at the Terminal Building, Interspace and the client involved in that project proposed a form of contract to govern their relationship. The form of contract was approved by the client and his lawyers. However, the form of contract was never executed either by Interspace or the client. The proposed form of contract retained the design manager to perform professional services and construction management services at the project. The client appointed the design manager his authorized limited agent to award contracts for the client's account covering the furnishing of materials and/or labour by trade contractors and suppliers for various parts of the project, also to purchase and/or rent for the client's account the necessary materials, tools, equipment and supplies required for the project. All materials and labour contract awards and supply purchases and rentals were to be in the name of the client and the client was to be required to pay for same upon presentation of invoices by the design manager. The client was to be required to pay the design manager a fee for design of the project of a percentage of the actual costs of the project and a fee of a percentage of the total value of the project for basic services of supervising the project and obtaining subtrades and contractors for the work. The client was also to be responsible for the reimbursement of the actual amount of all disbursements which were chargeable to the client under the provisions of the form of contract. The client was to be bound by the design manager's progress certificates and certificates confirming work. While the purchase orders might not have stated that Interspace was acting as the agent for the client, it was the evidence of Mr. Guthrie that the suppliers knew they were dealing with the client and not Interspace.

12. In cross-examination, Mr. Guthrie explained that once Candesco was in receivership it was very difficult to obtain credit and that bonding was not required for the manner in which Interspace was conducting its affairs. He informed the Board that he and Mr. Karnotzki looked for a way for clients to pay the draws. In awarding subcontracts, Interspace relied upon the knowledge of Mr. Guthrie and Mr. Karnotzki of contractors regarding their ability and reliability. Some of the projects undertaken by Interspace have been based upon an exchange of correspondence and without the existence of a formal contract. On other occasions, projects have been performed by Interspace without a contract on the basis of mutual trust between Interspace and the client.

13. There is no dispute that Candesco went into receivership as a result of financial problems and that Mr. Guthrie and his wife were financially responsible for the unsatisfied portion of Candesco's debt to the Royal Bank of Canada. In these circumstances, it is easy to appreciate that Mr. Guthrie's credit standing suffered as a result of the commercial failure of Candesco. He decided that his best chance of earning a living was to explore ways of continuing in the field he knew most about, namely, the furnishing and installation of the interiors of commercial premises. In operating Candesco, Mr. Guthrie had been virtually the complete owner. Candesco had been operating a wood manufacturing plant with its own employees and had been engaged in the general contracting of the interiors of these commercial premises with its own employees.

14. Mr. Guthrie had decided that he could remain in his preferred field provided he did not have to try and obtain credit and was not responsible for payments to the contractors' suppliers. To this end, he decided to go into business with a former employee and very minor shareholder of Candesco, Mr. Karnotzki. The new business arrangement which was contemplated and entered into was on a basis of equal shares in a business which was eventually to be incorporated as Interspace. Whereas Candesco was formerly operating a business of designing, manufacturing and installing interior premises, Interspace limited its activities to design and consulting work for potential clients and preparing budgets and estimating costs and managing projects on behalf of the clients. The arrangements between the clients and Interspace in fact made it clear that contractors and suppliers were entering into contracts with the client and not with Interspace. The supervisors were paid by the clients after they had submitted their accounts to the clients. The clients contracted the work to be performed after consulting Interspace. The clients presently (and Candesco formerly) contracted out the electrical and plumbing work. The clients presently (unlike Candesco) contracted out the carpentry work. The time came, however, on a project in Sarnia when Interspace was unable to find anyone to perform the work required by the client. On that occasion, ECI performed the carpentry work and entered into a voluntary recognition agreement which bound it to the Carpenters' industrial, commercial and institutional collective agreement.

15. The Board has frequently recognized and stated that the meaning to be given to the word "business" in section 63(1)(a) depends upon the facts in each case. The business is the entire undertaking and includes physical assets such as equipment, premises, location, management, personnel, trade marks, accounts receivable, lists of customers, inventory, assignment of contracts and goodwill. To this end the Board has considered the extent to which elements of an existing business have or have not been transferred. The position of the Board was summarized in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 at page 698:

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis:



among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost important to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

16. None of Candesco's assets or employees were transferred to Interspace or ECI. There was no evidence of any continuation of the manufacturing formerly performed by Candesco. Similarly, there was no evidence of the transfer of any goodwill, trade marks, existing contracts or lists of customers to Interspace or ECI. In the absence of a sale of even the assets of the insolvent Candesco, the Board is not prepared to find that there was a sale of a business from Candesco to Interspace and ECI within the meaning of section 63.

17. The applicant has also requested relief under section 1(4) of the Act and has alleged that the respondents are all one employer. Section 1(4) states:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Where associated or related businesses are carried on by more than one entity under common control or direction, the Board may treat the entities as constituting one employer for the purpose of the Act and grant such relief by way of declaration or otherwise as the Board may deem appropriate. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board stated at page 949:

It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one.

Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously.

18. In the instant application Interspace and ECI are engaged in different businesses. Neither Interspace nor ECI manufactures the products which were formerly manufactured by Candesco. However, while ECI is engaged in performing interior carpentry work which was formerly performed by Candesco, Interspace is engaged in consulting and contract management work which was never performed by Candesco. Interspace does not serve the same general market as Candesco. The same is true with respect to employing the same mode or means of production and utilizing similar employee skills. There is no doubt that Interspace and ECI are carried on for the benefit of related principals. There is also no doubt that with respect to the performance of interior carpentry work, the applicant is in the same position with ECI that it was in with respect to Candesco. The purpose of section 1(4) is to preserve and to prevent the erosion of bargaining rights and not to extend bargaining rights. See *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535. The applicant possesses bargaining rights for the employees of ECI engaged in carpentry work and does not possess bargaining rights for any similar but non-existent employees of Interspace. The Board accepts the present method of business engaged in by Interspace as having evolved as a practical necessity from the insolvency and receivership of Candesco. If the Board were to extend the provincial collective agreement to Interspace, it would be tantamount to compelling Interspace to restructure its business.

19. While Interspace and ECI are carried on for the benefit of related principals, the various criteria referred to earlier do not lead the Board to conclude that it should make the declaration under section 1(4) which has been requested by the applicant. In our view, Interspace on the one hand and Candesco and ECI on the other hand are or were not carrying on associated or related activities. While ECI is carrying on a business which is associated or related with some of the work formerly carried on by Candesco, ECI is bound by the same provincial collective agreement to which Candesco is a signatory. A declaration by the Board with respect to Candesco and ECI would not confer, on the evidence before the Board, any additional rights on the applicant which it does not presently enjoy with respect to ECI.

20. For the foregoing reasons, this application is dismissed.

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**1677-84-R; 1678-84-R; 1679-84-U** London & District Service Workers' Union, Local 220, Applicant, v. Caressant Care Nursing Home of Canada Limited, VS Services Ltd., Respondents; London & District Service Workers' Union, Local 220, Complainant, v. **Caressant Care Nursing Home of Canada Limited**, Respondent

**Interference in Trade Unions — Related Employer — Sale of Business — Unfair Labour Practice — Nursing home sub-contracting dietary and housekeeping functions — Relinquishing responsibility and control — Not sale or related employers — *Kennedy Lodge* decision distinguished — Effect of sub-contract not basis for finding of violation of Act**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members B. Armstrong and R. D. McMurdo.

**APPEARANCES:** *David Starkman, Paul Middleton and Helen North for the applicant/complainant; Donald J. McKillop, Q.C. and James Lavalley for Caressant Care Nursing Home of Canada Limited; Paul Jarvis and Rick Ellis for VS Services Ltd.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER R. D. McMURDO; November 27, 1984**

1. All three of these applications have arisen in the course of attempts to resolve the matters outstanding in Board File No. 0275-84-R, including, in particular, the question of the appropriate voters' list, and involve a challenge under sections 1(4), 63 and 89 of the *bona fides* and legal effect of certain subcontracting arrangements between the respondents.
2. The name "Caressant Care of Canada Limited" appearing in the style of causes of these applications as the name of one of the respondents is amended to read: "Caressant Care Nursing Home of Canada Limited" and the name "Versa Services Limited, a Division of VS Services Limited" appearing in the style of cause of File Nos. 1677-84-R and 1678-84-R as the name of one of the respondents is amended to read: "VS Services Ltd."
3. It is the decision of Mr. McMurdo and myself not to call upon the respondent to make further argument upon these matters, and, as well, to render an oral decision for the parties in order to expedite other concurrent deliberations. It was agreed that the lengthy recitation of facts in Board File No. 0275-84-R, including the reference to Caressant Care's plans to contract out the dietary and housekeeping areas at its new Home, could be treated as background to the present applications. Indeed, the most immediate impact of the union's success in these applications would be to increase the number of jobs available at the new Home in St. Thomas for the former unionized employees of the Wilson Nursing Home. It is not easy for complainant's counsel to successfully attack the *bona fides* of an arrangement months after it became known to the complainant, and while the other matter was being litigated before the Board, when the only "new fact" before the parties is the decision of the Board in the other file directing a vote on the question of union representation. And on the evidence, we do not find the contracting-out arrangement here to be anything less than a *bona fide* or true contracting-out of employment services for a variety of acceptable business reasons.
4. The fact is that the respondent Caressant Care had committed itself to entering into a contracting-out arrangement with respect to the dietary and housekeeping services as an



experiment with respect to the new Home that it was contemplating in St. Thomas, as a cure to some of the problems which it had experienced in the start-up of some of its other Homes, well before the unionized operation of Wilson Nursing Home came into the picture. Contrary to the argument of the applicant, we do not find it curious that a source of dietary and housekeeping employees subsequently coming available from Wilson did not cause Caressant Care to alter its plans to experiment with contracting out in those areas. We note as well in that regard that the number of persons available from Wilson would not in themselves have satisfied the requirement and eliminated the task of training and selecting employees for the new Home. And, recognizing that the Wilson staff were not hired through the Caressant Care organization in the first place, we are prepared as well to accept the evidence of Mr. Lavalle that he was of the view that an upgrading of staff might also result from engaging the services of a specialized and experienced contractor in this field. We find on the evidence that Versa Services and the other established contractors in the business whom Caressant Care approached really did offer a range of managerial and employment services, as well as head office resource personnel and the lower cost of volume food-buying, which caused Caressant Care to find them attractive, and which allowed Caressant Care and its own on-site management to relinquish the time and responsibility for selecting, training and supervising staff for the dietary and housekeeping areas.

5. Clearly the representations in Versa Services' promotional material (Exhibit #3) have to be read with the actual contract documents, and the evidence of all witnesses was consistent with that. But those representations are general in nature, and the Board has to look as well at the substance of what has been occurring between the parties, as the Board has always said. There is no doubt that all of the services provided by Versa Services or any contractor, to the licensee of the Home would have to be carried out under the "*general* direction" of the licensee, and the contractor remain "responsible" to the licensee, as Exhibit 3 stipulates, for it is the licensee itself who at all times remains ultimately responsible for the maintenance of adequate care in the Home. But the specific options reserved to Caressant Care under this arrangement we find to be no more than a customer could normally expect to have access to, either expressly or as a matter of commercial reality, in ensuring that the performance of the contractor continues at all times to meet its general specifications and requirements. We recognize that there is in any business relationship, apart from perhaps fixed-term contracts, the right of termination of the arrangement by the customer which, as a practical matter, requires a contractor to be more or less responsive to, or at least give full and careful consideration to, any complaints by its customers. The question is whether, on an on-going basis, the contractor really has taken over control and responsibility for the selection, training and supervision of the employee workforce, and is truly independent in making the decisions that it does. As the Board stated in *Kennedy Lodge Inc.* [1984] OLRB Rep. July 931, at paragraph 63:

63. While each case must be decided on its own facts, and while no two cases will be the same, there are certain rebuttable inferences that can be drawn from the nature of the subcontracting arrangement itself.

Where it is shown that under the subcontracting arrangement the employer retains control over the performance of the work and the employment relations of those who perform it, so that the persons performing the work are, in reality, the employees of that employer, and, as in this case, where they have replaced bargaining unit employees, an inference of anti-union motivation may readily be drawn. Where those performing the work that had previously been performed by members of the bargaining unit are in reality the employees of the employer, in the sense that the employer

continues to control the performance of the work and the employment relations of those who perform it, an inference can easily be drawn that the employer has acted to replace his bargaining unit employees in order to undermine their collective bargaining rights. However, where control of this type is relinquished so that the work is performed by the employees of the subcontractor under the direction of the subcontractor's organization and utilizing the resources of that organization, the same inference does not necessarily arise. Indeed, in the absence of something more (for example, an express threat to contract out if certain rights under the Act are relied on) it is difficult to draw an adverse inference with respect to motive from the simple fact of a decision to enter into a genuine arm's length subcontracting arrangement.

The present case in our view parallels in its essential respects that of *Charming Hostess and Amsterdam Catering Services Limited*, [1982] OLRB Reports April 536. There the Board at paragraph 36 remarked, in looking at the contracting-out of certain hospitality functions on the customer's premises:

It is difficult to discern any tangible parts of Molson's business which have actually been transferred. In Charming's case the sub-contractor acquired nothing at all other than the right to supply Molson's requirements with its own personnel. Amsterdam acquired the right to use certain kitchen equipment and dishes on the Molson's premises, and, no doubt, the availability of this equipment is a factor in Amsterdam's ability to efficiently meet Molson's needs; but in view of Amsterdam's established presence in the food service industry, substantial organization in its own right, back-up facilities, and recognized expertise, it is difficult to accord much significance to this fact."

That was a critical passage in the Board's reasons dealing with the application of section 63, the "sale of a business" provision of the Act. With respect to the application of section 1(4), the "related-employer" provision, the Board went on to make some pointed comments as well, comments which continue to be important in the context of what has been evolving in the nursing home industry, and a matter about which the Board continues to have sensitivity. The Board noted in paragraph 42:

Section 1(4) does impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own — even though the arrangement may not have been undertaken for the purpose of subverting bargaining rights (in which case unfair labour practice considerations might also arise). This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer's premises, with the first employer's equipment, in conjunction with the work performed by the first employer's own employees, and subject to the first employer's overall direction and control.

The Board then went on in that paragraph to note a prime example of what it was referring to, saying:

In the *Great Atlantic and Pacific Company of Canada Limited*, [1981] OLRB Rep. Mar. 285, for example, legislation required “A & P” to create a new corporate vehicle to run the pharmacy department which it had established in its larger food stores. There was no anti-union motive, but the separate legal identity of the “drug company” was totally artificial from a collective bargaining point of view, and the Board issued a related employer declaration. *The drug company was completely dominated by A & P and had no business activities apart from it.* The fact that the drug company hired employees, paid them and directed them in their daily activities did not obscure the reality of the situation.

(emphasis added)

The Board then went on to say in paragraph 44:

The more closely the purchaser of employee services controls when, where, how, by whom and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. If at the same time the subcontractor is effectively dominated by the purchaser and it appears that the notion of a subcontract is introduced not to provide independent managerial and employee skills but rather a separate “non-union” corporate vehicle which permits the purchaser to have the same work performed in much the same way as before but beyond the ambit of its collective agreement, a section 1(4) declaration might well be warranted. It was considerations such as these which appear to have prompted the Board to issue 1(4) declarations in *Donald E. Foley Limited*, [1980] OLRB Rep. Apr. 436 and *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176, even though there was no direct financial ownership of the subcontractor in either case.

The Board then went on to note, at paragraph 45:

However, in the Board’s view it is both undesirable and unnecessary in the instant case to speculate about the potential reach of section 1(4), or catalogue the many factors distinguishing the present situation from that before the Board in *Normick* or *Foley*. It is clear on the evidence that Charming and Amsterdam are independent businesses, with their own established employee complement, operated for the benefit of their own principals, and providing their specialized services to a variety of purchasers of which Molson’s is only one. Both businesses were in operation long before the Molson’s contract, and, no doubt, they will continue thereafter. Neither is a mere shell or a device to avoid collective bargaining obligations, and neither can be regarded as an instrumentality of Molson’s. We do not think the situation here falls within the intended ambit of section 1(4).

As well, in cases involving the kind of contracting-out proposed in, e.g., *Kennedy Lodge*, the pre-existence and independence of the corporate subcontractor did not prevent the Board from once again carrying out an analysis of the critical issue of “control”, and in that case the Board found that control in fact had not passed from the operator to the nominal contractor.



6. We are satisfied in this case, even bearing in mind the kind of options reserved to the customer in the “promotional” document, that Versa Services has in fact assumed responsibility for providing through its own organization the Home’s food and housekeeping requirements, and, in the words of its contracts with Caressant Care, for “all rules, controls, working conditions, hiring, firing and direction of Versa employees”. The evidence discloses that the assumption of these responsibilities has been more than a matter merely of “form”, i.e., as spelled out in potentially self-serving contract language. Contrary to *Kennedy Lodge*, where the operator of the Home purported to delegate its primary responsibility, being the provision of nursing care, but at the same time retained its entire staff of nursing supervisors and charge nurses in their normal capacities, Caressant Care no longer has any dietary or housekeeping supervisors for this Home. The evidence establishes further that all hiring, supervision and disciplining of the staff for these areas has been carried out by Versa Services itself, through its on-site supervisor, acting either on her own or in consultation with her District Manager, and without the approval of Caressant Care. All menus are planned by Versa Services’ head office, and any complaints by residents or the Home are handled by the Versa Services supervisor, Ms. Cornish (who is an employee chosen out of Versa Service’s own existing organization). Ms. Cornish has decided on her own to both discipline and terminate Versa Service employees employed at the Home, the latter in consultation with her District Manager. Ms. Cornish was also asked by Caressant Care to fire an employee with whom Caressant Care was unhappy, but after speaking with the employee, Ms. Cornish decided that further counseling and a warning would be sufficient. Versa Services also asserts that it has flexibility on the question of increases or decreases in wage rates, although it acknowledges that it would have to think carefully before passing on any increase in the “bottom-line” set out its “cost plus” proposal to Caressant Care.

7. In *Kennedy Lodge*, the Board introduced the terms “core” and “peripheral” functions, in commenting upon the question of community perception. The Board wrote, in general terms, at paragraph 61:

The essence of the argument put forward by the applicant/complainant in this matter is that, apart altogether from the collective agreement, a decision to subcontract, if undertaken for no other reason than to avoid the wage rates in the collective agreement, breaches the unfair labour practice provisions of the *Labour Relations Act*. If this is so an employer who contracts for security, janitorial, cafeteria or any number of other functions that are peripheral to the core activities of his business, because he can have these services performed less expensively by a subcontractor than under the collective agreement, would be in breach of the Act. This type of subcontracting arrangement, usually undertaken to reduce costs, has become quite common and it would surely come as a surprise to the community if we were to find that it was in breach of the Act. However, it would be no less of a surprise to the community if we were to find that a decision taken to use a subcontractor, in place of bargaining unit employees, to perform a part or all of the employer’s core activity on the employer’s premises utilizing the employer’s equipment, and under the employer’s control, as in this case, was not in breach of the unfair labour practice provisions of the Act.

We do not find cost-savings to have been the controlling factor in any event in the present case (where the decision to contract-out was made prior to the time that the higher rates called for under the Wilson collective agreement had become a possibility), but cite the above passage

only because of its observations on community perception. Without seeking to define any further the terms “core” and “peripheral”, we would simply observe that the contracting out of the kind of work involved here, in terms of food services and housekeeping services, would not seem to offend the sensibilities of the labour relations community in the way that the purported contracting-out of direct nursing care does. And indeed the history of companies like Versa Services in providing these services within the health care industry of the province makes it difficult for anyone to argue “surprise” over a development like the present. In any event, as the Board noted at the end of its comments with respect to community perception in *Kennedy Lodge*, the question before the Board and arising under the Act remains one of intent, and of “control”, and we find nothing in the evidence before us to suggest anything but a *bona fide* intent to hand the responsibility for these severable aspects of the Home over to the business organization of Versa Services. Whether these are areas, as they obviously are, which are integral to the continued operation of a nursing home, and with respect to which a strike could obviously cause disruption, and whether as a result the employees engaged in these on-site activities fall under the *Hospital Labour Disputes Arbitration Act*, as they obviously do, does not assist the Board in assessing on a case by case basis the degree of responsibility given up in a particular “subcontracting” arrangement, and that remains the issue for the Board under section 1(4) of our Act.

8. Nor do we find the provisions of the *Nursing Home Act* and its Regulations dispositive of this issue. We find the regulations not so clear on their face as to disclose an intent on the part of the Legislature to necessarily alter by apparently minor amendments to the regulations a long-standing option to contract-in professional dietary services in this industry. And more important to the issue before us, we do not find these regulations so clear as to suggest to us that the intentions and conduct of the parties to this arrangement must be “deemed” to be something other than that which has been demonstrated in the evidence before us.

9. Alternatively, the complainant relies upon the case of *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, in asking the Board to find a violation of the Act solely on the basis of the *effect* that a contracting-out arrangement will have on the rights of a trade union and its members. The Board at paragraph 66 of *Kennedy Lodge* dealt with this argument as follows:

66. Finally, in *International Wallcovers*, *supra*, the Board indicated that it would be prepared in appropriate circumstances to adopt a “non-motive approach to section 64”, such as in instances of “clear mistake” or “discipline clearly out of all proportion to the misconduct in issue”, where a clear imbalance in favour of protected activity exists. However, it is doubtful that this non-motive approach will be of assistance in deciding cases involving subcontracting since, as indicated above, where the persons performing the service for the employer under such contracts are, in reality, the employees of that employer, anti-union motivation can readily be inferred. Where, on the other hand, for purposes of economy and efficiency, control is relinquished so that work that had been performed by members of the bargaining unit is performed by the employees of a genuine arm’s length subcontractor, under the direction of the subcontractor’s organization and utilizing the resources of that organization, it would be difficult to find a clear imbalance in favour of protected activity.

10. Finally, we do not find it persuasive to argue at this point that the Board can infer from the scope clauses of the collective agreement a prohibition against contracting-out during the life of the agreement, in the absence, as here, of any express prohibition in the agreement to that effect. Both sides of this issue have been canvassed most recently by the Board in *Kennedy Lodge* itself, and the Board, at paragraph 61, wrote:

This leads us to a discussion of subcontracting; an arrangement under which an employer contracts for certain services that he is already or could otherwise perform himself. Given the effect upon the employer's complement of employees, it is not difficult to understand why decisions to subcontract often generate a vigorous response from trade unions. However, it has long been accepted in the arbitral jurisprudence in this jurisdiction that, absent an express prohibition in the collective agreement, an employer is free to contract out. (See *Kennedy Lodge Nursing Home*, (1982) 28 L.A.C. (2d) 380 (Brunner) for the most recent review of the cases). In this connection we have been careful to point out that in order to fit within this presumption and to be a proper exercise of management rights under a collective agreement the contracting out must be real, in the sense that the work in question is moved within the subcontractor's organization where it is performed by the subcontractor's employees. If the work is performed by the subcontractor's employees there will be no breach of a collective agreement which does not expressly prohibit contracting out.

11. The Board, in all of the particular circumstances of this case, is not persuaded that any basis for relief has been made out, and the applications and complaint are hereby dismissed.

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**1158-84-R** International Union of Operating Engineers, Local 796, Applicant, v. **Citicom Inc.**, Respondent, v. The Canadian Guards Association, Intervener

Security Guard — Control room operators having authority to refuse admission and to detain employees — Duty to report stealing, vandalizing, etc. by radio — Persons integral part of security system — Real possibility of conflict of interest — Excluded from unit as guards

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members I. M. Stamp and L. C. Collins.

**APPEARANCES:** Susan Ursel and J. Sullivan for the applicant; Brian Burkett, David Wiseman, David Howard and Lyall Thompson for the respondent; R. C. Butler for the intervener.

**DECISION OF THE BOARD;** January 22, 1985

1. The Board delivered the following oral decision at its hearing on January 17, 1985 which was scheduled to hear the representations of the parties as to the conclusions the Board should reach in view of the Labour Relations Officer report that was issued on October 23, 1984:

#### ORAL DECISION

The issue before the Board is whether the four employees of the respondent classified as control room operators are guards, as contemplated by section 12 of the *Labour Relations Act*. Section 12 of the Act states in part:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer,  
 . . . .

We adopt the test that the Board applied in *Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046 at paragraph 18, page 1051 to determine whether employees are guards within the meaning of the *Labour Relations Act*. That test was stated as follows:

The test is whether [the] duties of the persons who are claimed to be guards for purposes of section 11 [now section 12] raise the *real possibility* of a conflict of interest with respect to other employees of their employer. . . .

[emphasis added]

The report of the Labour Relations Officer was in the form of an agreed statement of fact. One of the facts agreed to was that the control room operators had all acted as security guards in previous jobs but that such experience was not a requirement of the present job. Counsel for the applicant submitted that this fact was irrelevant to the issue and we agree. We do not see how the previous employment history of a person has any

significance in assessing the duties and responsibilities of that person's present job where that previous experience is neither mentioned as condition or requirement of the job in question or is it even stated to be a factor that was taken into consideration in the hiring for that job.

A portion of the agreed statement of fact provided:

C. Security Screens:

4. If a Control Room Operator detected other employees vandalizing, stealing, fighting etc. they [sic] would contact the security guards by radio and instruct them to investigate the incident.
5. The Control Room Operators have the authority to grant or refuse admission of employees to the truck dock area.
6. The Control Room Operators have the authority to detain vehicles or employees in the truck dock area (ie. access to and from the truck dock area is controlled by opening and closing of doors).

Counsel for the applicant submits that the monitoring and reporting functions of the control room operators are no different than the common law duty of fidelity owed by all employees to their employers, and relies on this Board's decision in *Pal-O-Pak Manufacturing Company Limited*, [1978] OLRB Rep. Jan. 95 at paragraph 5 for that proposition.

We disagree. We do not read that decision of the Board as broadly as counsel does. If the common law duty of fidelity is as broad as counsel for the applicant submits, it would render both section 12 of the Act and the conflict of interest test used by the Board in applying that section superfluous.

In our view, the functions of the control room operators as set out in the Labour Relations Officer report clearly indicate to us that they are an integral part of the security functions of the respondent. Additionally, both the security guards and control room operators report to the chief of security. We are satisfied that their job responsibilities which require them to monitor areas where other employees of the respondent are working, (see paragraph 3, section C of the Labour Relations Officer report) and to report on the activity as set out in paragraph 4 of section C of the report, referred to above, create a "real possibility of a conflict of interest". (See *Wells Fargo Armcar, Inc.*, *supra*.)

We are therefore satisfied that the control room operators are guards within the meaning of the Act and are thus excluded from the applicant's bargaining unit and, by agreement of the parties, are part of the intervenor's bargaining unit.

2. Following the delivery of the Board's decision, the parties agreed that the Board should issue a final certificate to the applicant in respect of the bargaining unit as described in paragraph 6 of the Board's decision of August 21, 1984.

3. Therefore, having regard to the agreement of the parties, the Board finds that all employees of the respondent at the Rideau Centre, Ottawa, save and except supervisors, persons above the rank of supervisor, security guards, office and clerical staff, janitorial personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. For purposes of clarity, the Board notes that the term "guards" includes the control room operators.

5. Having regard to the findings made by the Board in paragraph 5 of its August 21, 1984 decision, a certificate will issue to the applicant.

**2521-84-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Applicant, v. Columbus McKinnon Limited, Respondent**

**Membership Evidence — Practice and Procedure — Union filing membership evidence in support of certification application — Subsequently writing letter to employees requesting confirmation of accuracy of union records re membership evidence — Not raising suspicion to cause Board to dismiss, impose bar or direct vote — Board not conducting own investigation in absence of specific allegation of non-sign or non-pay**

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *Lorna J. Moses and Howard Powers for the applicant; Peter J. Thorup, Peter A. Grant, Roger A. Williams, Dennis Good and Frank Meevis for the respondent.*

**DECISION OF VICE-CHAIRMAN HARRY FREEDMAN AND BOARD MEMBER B. L. ARMSTRONG; January 16, 1985**

1. At the hearing of this matter on January 4, 1985, the parties agreed that the Board should first deal with the respondent's submissions with respect to the documentary evidence filed by the applicant in support of its application. Following the evidence and the submissions of the parties, the Board with Board Member J. A. Ronson dissenting, delivered the following oral ruling:

**ORAL RULING**

In this application for certification, the applicant filed documentary evidence of membership that was comprised of a two-part application for membership card and a carbon copy of a receipt issued by the applicant to the employee who had applied for membership and paid a dollar to the applicant. The top portion or part of the card is the actual form of application



signed by the employee who is applying for membership in the applicant. It also has a place for the date. The bottom portion or part of the card states that "\$1.00 initiation fee received by" with a blank space and line under which is printed "signature of collector". Under that statement and signature of the collector is printed "I hereby certify that I paid the above amount" with a space for the signature of the employee who had signed his or her name in the top part of the card. Each of the application for membership cards filed by the applicant were signed in two places by an employee and in one place by a collector.

The application for membership cards were signed between December 9 and December 12, 1984, inclusive. There was more than one collector shown on the application for membership cards although Mr. Howard Powers, an official of the applicant, signed all of the receipts dated December 12th that were issued by the applicant. He also was one of the collectors on the application for membership cards and signed the Form 9 Declaration which the applicant filed on December 19, 1984.

Counsel for the respondent wrote to the Board, by letter dated December 21, 1984, submitting that there were irregularities in the membership evidence, and requested the Board to appoint a Labour Relations Officer to conduct an investigation. That letter provided:

Mr. D. K. Aynsley  
Registrar  
Ontario Labour Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

Dear Mr. Aynsley:

Re: U.A.W. and Columbus McKinnon  
Limited  
Board File No. 2521-84-R

It has just come to the attention of the Respondent that there appears to have been a serious irregularity in the collection of membership evidence by the Applicant in this matter.

It is the Respondent's information that several days after the date of application for certification, Mr. Howard Powers, an International Representative of the U.A.W. and the signatory of the Application for Certification in this matter, wrote to employees of the Respondent. The gist of this letter was to request that any employee who had not yet paid their \$1.00 membership fee, should proceed to do so. Apparently, Mr. Powers enclosed a self-addressed envelope for employees to use if they wished.

In light of the foregoing, we request the Board to conduct an investigation into this allegation.

The Respondent hereby reserves the right to submit that all of the Applicant's membership evidence ought to be disregarded and that the application ought to be dismissed, — particularly in light of the apparent knowledge and involvement of an International Representative of the Applicant. Moreover, the Respondent submits that the Applicant bears the onus of demonstrating before the Board why any of its membership evidence ought to receive any weight, in view of the apparent occurrence of a serious irregularity.

Yours very truly,

"P. J. Thorup"

Peter J. Thorup.

The Registrar of the Board did not assign a Labour Relations Officer to conduct an investigation, following the Board's normal practice not to do so in the absence of a *specific allegation* that an employee whose name appears on the membership evidence filed by the union did not sign a membership card or did not pay \$1.00 to the union.

At the hearing of this matter, the respondent adduced evidence that established that a letter was sent from the applicant to at least one employee. The respondent did not have that letter in its possession, but introduced as an exhibit (exhibit #1) a copy of a letter which was identical in all material respects to that letter after counsel for the respondent asked the Board to direct the applicant to produce it.

That letter states:

December 14, 1984.

TO: U.A.W. MEMBERS  
COLUMBUS MCKINNON LTD.,  
COBOURG, ONTARIO

Greetings: —

Our records show that you are an employee of Columbus McKinnon Limited, Cobourg, Ontario, and that you have signed an Application for Membership card in the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), and *paid one dollar (\$1.00) to comply with the requirements of the Ontario Labour Relations Board.*

[original emphasis]

IF FOR ANY REASON OUR RECORDS ARE INCORRECT,

NOTIFY OUR OFFICE IMMEDIATELY IN WRITING. FOR YOUR CONVENIENCE, WE HAVE ENCLOSED A SELF-ADDRESSED ENVELOPE (NO POSTAGE NECESSARY).

UNLESS WE HEAR FROM YOU WITHIN SEVEN DAYS FROM THE DATE OF MAILING THIS LETTER, WE WILL ASSUME OUR RECORDS ARE CORRECT.

We have enclosed your Official Receipt for the \$1.00 paid. This \$1.00 is your initiation fee in full and dues in the U.A.W. do not start until such time as the U.A.W. is certified and your first U.A.W. agreement is signed.

The U.A.W. has applied for certification for the plant employees at Columbus McKinnon Limited, and notices from the Department of Labour should be posted by your employer.

Fraternally yours,

“HOWARD POWERS”  
International Representative,  
U.A.W. — Canada.

The applicant called no evidence.

Counsel for the respondent argued that the letter raises a suspicion as to the propriety of the membership evidence filed. He concedes that there was no direct evidence of a non-pay in respect of the documentary evidence of membership filed by the applicant, although he submitted that it was irregular for the receipts to be signed and dated after the money was paid to a collector who was not the person who signed the receipt. Counsel requested that the Board discount all of the membership evidence, or in the alternative, order a representation vote to confirm the wishes of the employees and to alleviate the suspicion raised by the applicant's letter. He also relies on the fact that the applicant called no evidence and asked us to draw an adverse inference from that.

The representative of the applicant submitted that its letter dated December 14, 1984 was merely an extra check on the documentary evidence that it had filed and that there was nothing before the Board to cause the Board to be suspicious of the propriety of that evidence.

It is well known that the Board places a high and strict standard on the documentary evidence of membership filed in support of an application for certification and on the statutory declaration (Form 9) that is filed to authenticate that evidence. (See *Webster Air Equipment Company Ltd.* (1958), 58 CLLC ¶18,110 where the Board stated:



It is obviously a practical impossibility for the Board to interview each employee on whose behalf documentary evidence of membership is filed in a certification proceeding, in order to ascertain whether he has personally signed the application for membership and whether he has paid on his own behalf the dues or fees which the receipt accompanying the application purports to acknowledge. In addition to comparing the signatures on the documentary evidence of membership filed by the union with facsimile signatures filed by the employer, the Board seeks from the representative of the union who appears at the hearing assurances that the payment of dues has conformed to the Board's policy in that regard, and it requires such assurances to be based on personal knowledge of the facts or on inquiries from the persons who themselves collected the money. In the normal course, the Board accepts such representations, at their face value. However, since the Board is compelled to rely to such an extent on evidence which, by the very nature of things, is not subject to examination by the parties to the proceedings (see section 72(1) of *The Labour Relations Act*), it must be very circumspect in accepting it and it must insist on the highest standards of integrity on the part of those who submit such evidence. Any attempt to mislead the Board or any failure to make full disclosure of all material facts must weigh heavily against an applicant.)

In this case the receipt signed by the applicant appears to be merely a confirmation of the bottom portion of the application for membership card. The application for membership cards and the receipts are consistent with one another. The signed application for membership and the collector's signature and the signed declaration by the employee that he or she paid at least \$1.00 to the applicant is often the only form of membership evidence on which the Board relies. In this case, the receipt attached to the application for membership card is supportive of that payment.

With respect to the letter from the applicant dated December 14, 1984 (See Exhibit #1), although we are troubled that the applicant chose not to lead any evidence to explain the reason for the letter, we are not satisfied that the sending of the letter and its contents raises a suspicion about the membership evidence filed in this case. While it is open to draw different and opposing reasonable inferences from the fact of the sending of the letter and its contents, we find that the sending of the letter and the letter itself are consistent with a trade union taking extra precautions with respect to the accuracy of the membership evidence it has filed.

The submissions of the respondent in this case are analogous to the submissions made in a situation where a union has withdrawn an application for certification in the face of charges filed against its membership evidence, and then re-files a new application shortly thereafter. It has been argued in those cases that there is a cloud of suspicion over the membership evidence in the second application because of the withdrawal of the first application. The Board rejected that argument in *Leco Industries Ltd.*, [1979] OLRB Rep. May 404 at page 407 where the Board stated:

"The Board notes that this new documentary evidence of membership is

satisfactory in all respects and again indicates that well in excess of fifty-five per cent of the employees in the agreed bargaining unit support the applicant. Nevertheless, the respondents contend that the Board should either dismiss the application, impose a bar to the present application (which presumably would involve a reconsideration of the original application in which no bar was imposed) or, in the alternative, exercise its discretion to order a representation vote — a discretion which the Board has even though the union has demonstrated sufficient support for certification without a representation vote. The respondents contend that since, in the previous application there might have been evidence to sustain their allegations of evidentiary irregularities, or there might have been evidence from which the Board might infer fraud or negligence on the part of the trade union representative, there is a “cloud” over the applicant’s present application, and the Board should seek the confirmatory evidence of a representation vote before issuing a certificate.

The argument made by the respondents in the present case is virtually identical to that considered, and rejected, by the Board in the very recent decision in the *Ontario Hospital Association*, [1979] OLRB Rep. March 243. There, too, the respondent argued that, because of certain allegations which had been made in a previous application, the Board should exercise its discretion to order a representation vote in a subsequent application. At pages 245-46 the *Ontario Hospital Association* decision the Board summarized the argument as follows:

9. The respondent argued that the Board relies upon Form 8, Declaration Concerning Membership Documents, and the evidence of membership filed by the applicant. The respondent stressed that Form 8 is to be completed on the basis of knowledge (including inquiries), information and belief and argued that Form 8 had been signed negligently and erroneously. On this basis the Form 8 filed in File No. 0718-78-R was characterized as inaccurate, false and misleading. In these circumstances, the respondent argued that there is a cloud on the evidence in the instant application (even if new evidence of membership has been filed) which may only be dissipated by a representation vote in the instant application.

10. The central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in one application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which involved the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

In view of this very recent Board decision, which contains a review of the authorities, it is unnecessary for the Board to repeat that review in the present case. Suffice to say that the Board adopts the reasoning and analysis of the panel in the *Ontario Hospital Association* case, as well as its conclusion that no representation vote should be ordered in these circumstances.

... we are not persuaded that the allegations in the present application are of such kind or character as to prompt the exercise of our discretion to impose a bar or order a representation vote. There is no allegation before the Board in the present case with respect to any impropriety in the *evidence* of irregularity of misconduct in the previous application.

See also *Walbar of Canada Ltd.*, [1982] OLRB Rep. Nov. 1734 at page 1735.

In our view, the evidence of membership and the Form 9 Declaration that the applicant has filed in this case is clear evidence of the wishes of the employees. The letter sent by the applicant does not, in our opinion, raise the suspicion contended for by counsel for the respondent. Thus, the Board will rely on that evidence, and further, is not satisfied that it should direct a representation vote.

2. After the Board orally rendered its majority and minority rulings in this matter, the parties advised the Board that they had met with a Labour Relations Officer and had resolved all of the other outstanding issues, and agreed that the Board should deal with the matter based on its ruling with respect to the membership evidence and on the report of the Labour Relations Officer.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Cobourg, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 20, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. The following oral ruling was delivered by Board Member J.A. Ronson at the hearing of this matter:

#### **ORAL RULING**

This application for certification was filed on December 12, 1984. By letter dated December 21, 1984 the Respondent Employer provided the following information to the Board and requested an investigation.

Mr. D. K. Aynsley  
Registrar



Ontario Labour Relations Board  
 400 University Avenue  
 Toronto, Ontario  
 M7A 1V4

Dear Mr. Aynsley:

Re: U.A.W. and Columbus McKinnon  
 Limited  
Board File No. 2521-84-R

It has just come to the attention of the Respondent that there appears to have been a serious irregularity in the collection of membership evidence by the Applicant in this matter.

It is the Respondent's information that several days after the date of application for certification, Mr. Howard Powers, an International Representative of the U.A.W. and the signatory of the Application for Certification in this matter, wrote to employees of the Respondent. The gist of this letter was to request that any employee who had not yet paid their \$1.00 membership fee, should proceed to do so. Apparently, Mr. Powers enclosed a self-addressed envelope for employees to use if they wished.

In light of the foregoing, we request the Board to conduct an investigation into this allegation.

The Respondent hereby reserves the right to submit that all of the Applicant's membership evidence ought to be disregarded and that the application ought to be dismissed, — particularly in light of the apparent knowledge and involvement of an International Representative of the Applicant. Moreover, the Respondent submits that the Applicant bears the onus of demonstrating before the Board why any of its membership evidence ought to receive any weight, in view of the apparent occurrence of a serious irregularity.

Yours very truly,

"P. J. Thorup"

Peter J. Thorup.

The Board declined to conduct its own investigation into the allegations concerning the hearsay evidence filed with it.

At the hearing the Union admitted that a letter had been mailed as alleged but refused to provide a copy to the Company or to the Board when requested to do so. One really wonders why?

In any event the Company led evidence to prove the existence of such a letter

and then requested an order that the letter be produced. At that point the Union agreed to produce it. The letter produced is not the same as the letter we heard evidence about. The evidence of the Company witness was that the name of an employee of the Company was typed in at some place near the top of the letter. The letter reads as follows:

December 14, 1984.

TO: U.A.W. MEMBERS  
COLUMBUS MCKINNON LTD., COBOURG,  
ONTARIO

Greetings: —

Our records show that you are an employee of Columbus McKinnon Limited, Cobourg, Ontario, and that you have signed an Application for Membership card in the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), and *paid one dollar (\$1.00) to comply with the requirements of the Ontario Labour Relations Board.*

IF FOR ANY REASON OUR RECORDS ARE INCORRECT, NOTIFY OUR OFFICE IMMEDIATELY IN WRITING. FOR YOUR CONVENIENCE, WE HAVE ENCLOSED A SELF-ADDRESSED ENVELOPE (NO POSTAGE NECESSARY).

UNLESS WE HEAR FROM YOU WITHIN SEVEN DAYS FROM THE DATE OF MAILING THIS LETTER, WE WILL ASSUME OUR RECORDS ARE CORRECT.

We have enclosed your Official Receipt for the \$1.00 paid. This \$1.00 is your initiation fee in full and dues in the U.A.W. do not start until such time as the U.A.W. is certified and your first U.A.W. agreement is signed.

The U.A.W. has applied for certification for the plant employees at Columbus McKinnon Limited, and notices from the Department of Labour should be posted by your employer.

Fraternally yours,

“Howard Powers”

HOWARD POWERS,  
International Representative,  
U.A.W. — Canada.

Now there are many reasons why such a letter could have been written. It

may be that it was a simple double check of records according to standard procedure. To those more suspicious than my colleagues, it may be that the Union was aware of defects in its membership evidence and was trying to ferret them out. Unfortunately we don't know why the letter was written as the Union called no evidence. And more specifically, we don't know if one or more employees mailed a dollar back in the envelope provided. That happening, of course, would require an amended Form 9 to be filed. Form 9 was not amended.

This Board has always been rigid in its approach to allegations made against the truth of documentary hearsay membership evidence. The Applicant Union is not entitled to the benefit of doubt. If its membership evidence is called into question the onus is on it to answer the question. In this case it has not done so.

It is reasonable to infer from the Union letter that there were defects in its evidence known to the union. That inference is re-inforced and becomes that only acceptable one when the Union chooses to call no evidence to rebut it.

Unlike my colleagues, who give the Union the benefit of doubt when it has not met the onus upon it, I would order a vote to clear the air of any and all suspicion.

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**2041-84-R Consolidated Bathurst Packaging Limited, Applicant, v. International Union of Operating Engineers and its Local No. 796, Respondent**

**Practice and Procedure — Termination — Board's usual practice to dismiss where no employees in unit at time termination application made — Union not responding to termination application and not attending hearing — Board terminating without vote where no demonstration of continued interest in bargaining rights**

**BEFORE:** Robert D. Howe, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *Thomas A. Stefanik, Ronald Gruber and Bernie Holmes for the applicant; no one appearing for the respondent.*

**DECISION OF THE BOARD;** January 18, 1985

1. This is an application under section 59(2) of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. Since no one appeared on behalf of the respondent at 9:30 a.m. on the day of hearing of this matter, the hearing was recessed until 10:00 a.m. as a matter of courtesy in view of the possibility that the representative(s) of the respondent might have been delayed. When no one had appeared on behalf of the respondent by 10:00 a.m., the Board proceeded to hear the application.

3. Section 59(2) of the Act provides:

Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

4. On December 21, 1981, the applicant and the respondent entered into a collective agreement, effective from March 22, 1981, to March 21, 1983, in respect of a bargaining unit consisting of "all stationary engineers holding Operating Engineers' Certificates in good standing employed in the Boiler Room of the Plant of the company located at 730 Islington Avenue South, Toronto, Ontario." On March 1, 1982, the boiler system at that plant was switched over to an automatic system. As a result no stationary engineers were required after that date. (One stationary engineer remained in the employ of the applicant, but was transferred into another bargaining unit, in respect of which the International Woodworkers of America, Local 2-76, held bargaining rights. That individual has since resigned from employment with the applicant.) On February 7, 1983, the respondent, pursuant to section 53(1) of the Act, gave the applicant written notice of its desire to bargain with a view to the renewal, with modifica-

tions, of that collective agreement. After receiving that notice, the applicant "did nothing", and heard nothing further from the respondent. The present termination application was filed with the Board on October 3, 1984. The respondent did not file a reply and, as noted above, did not appear at the hearing.

5. In a situation in which there are no employees in the bargaining unit, the Board will generally dismiss an application for termination of a union's bargaining rights where the union demonstrates a continued interest in those bargaining rights by, for example, attending at the hearing to provide an explanation for its failure to commence (or continue) to bargain within the time period specified in the section 59(2). See, for example, *Rapid Ready-Mix Limited*, [1982] OLRB Rep. Sept. 1348; *International Harvester Company of Canada, Limited*, [1972] OLRB Rep. July 762; and *BLH-Bertrum Ltd.*, [1967] OLRB Rep. Oct. 652. However, in the absence of any such explanation or demonstration of a continued interest by the respondent in the bargaining rights which it has failed to exercise, the Board may appropriately exercise its discretion under section 59(2) to terminate those bargaining rights without a vote under section 59(2). See, generally, *Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. Jan. 32; *Fuller's Restaurant*, [1981] OLRB Rep. Feb. 156; and *Canwood Lachute*, [1979] OLRB Rep. Dec. 1140.

6. In the present case, the respondent gave the applicant written notice to bargain on February 7, 1983, but did not thereafter meet with the applicant to bargain or do anything else to demonstrate a continued interest in its bargaining rights. Moreover, the respondent neither replied to this application nor appeared at the hearing. Having regard to all of the circumstances, the Board finds this to be an appropriate case in which to exercise its discretion under section 59(2) to terminate the respondent's bargaining rights without a representation vote.

7. Accordingly, the Board hereby declares that the respondent no longer represents the employees of the applicant in the bargaining unit set forth above, for whom the respondent has heretofore been the bargaining agent.

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**1571-83-U; 1658-83-U** Rocco Dicognito, Donald Y. Hsu, Louie Savoia, Wolfgang Hauffe, Robert Proulx, Wray Carter, Andy Giamos, and the other persons listed on Schedule "A" to the complaint in File No. 1571-83-U, Complainants, v. Local 414, Retail, Wholesale and Department Store Union, Roy Higson, Dan Garvey, Wayne Barrett, Mike Hunt, John Hudson, and **Dominion Stores Limited**, Respondents

**Duty of Fair Representation — Practice and Procedure — Unfair Labour Practice — Failure to file complaint against employer for bad faith bargaining basis of unfair representation complaint — Union's defence that no basis for bad faith bargaining complaint — Whether complainants entitled to call evidence to show merits of alleged bad faith bargaining although individuals not having status to make such complaint directly**

**BEFORE:** D. E. Franks, Vice-Chairman.

**APPEARANCES:** *David C. Moore, Allan Dixon and Rocco Dicognito for the complainants in File No. 1571-83-U; Donald Y. Hsu for the complainants in File No. 1658-83-U; M. A. Hines and B. Burden for the respondent company; Stanley Simpson and Dan Garvey for the other respondents.*

**DECISION OF THE BOARD;** January 23, 1985

1. This is a complaint under section 89 alleging a violation of section 68 of the Act. The complaint includes *inter alia* an allegation that the trade union's failure to proceed with a section 15 violation against the employer gives rise to a violation of section 68 by the trade union, that is, the failure to complain of the company's failure to bargain in good faith was arbitrary, discriminatory or bad faith conduct by the respondent trade union.

2. The complainant has asked for the production of certain documents (or a subpoena ducus tecum on which the production of documents is "called" before the person subpoenaed). The respondent resists the issuance of such a subpoena or order to produce. The documents which the complainant requires produced would quite specifically be the documents that would be requested by a complainant in the section 15 failure to bargain case referred to above.

3. The employer resists the order on the grounds that such documents are irrelevant to the section 68 proceedings before the Board in this matter. Counsel for the employer was supported in this by both counsel for the respondent trade union and Mr. Hsu. In addition, when the motion in this matter was argued the Board raised with the complainant the matter that the Board will not, for policy reasons, give employees the status to argue a section 15 failure to bargain case on their own. That is, the Board limits the carriage of such proceedings to the parties to the bargaining and the effect of making such documents material to these proceedings would be to allow the complainant to indirectly do what the Board, for valid and important policy reasons, will not let an employee do directly under section 15 of the Act.

4. The complainant argues that both the union and the employer have developed a line of defence that the union refused to bring the section 15 complaint because there was no *prima facie* case under section 15. The complainant argues that he is entitled to call evidence to rebut this, that is, to show that there was a clear cut case which could be brought before the Board



under section 15 (presumably because the issuance of such a subpoena as requested now would lead to the production of internal memoranda showing that Dominion Stores Limited decided to franchise its operations before or during its bargaining with the union which the complainant alleges was a failure to bargain in good faith as required by section 15 of the Act.)

5. Both counsel for the trade union and the employer have in turn suggested that this is a blatant “fishing expedition” by counsel for the complainant and therefore the request for documents ought to be denied.

6. The question we are therefore called to decide is the following. Once a trade union or an employer raises as a defence in a section 68 case, the merits of the issue not proceeded with, is the complainant entitled to call evidence to rebut this view of the merits of the issue not proceeded with? The Board has often said in section 68 cases that it will not try the merits of a case, such as an arbitration not proceeded with. Nevertheless, the Board frequently hears evidence of the worth or worthlessness of a case, for example, an arbitration case as part of the context in which the union’s refusal to proceed with the arbitration is evaluated. Further, there is the matter as suggested by the complainant in this case that the remedy is evaluated on the basis of the “value” of the proceeding which was not undertaken.

7. The present case is of course more complicated than the more typical section 68 complaint in which the alleged violation relates to a failure to process a grievance to arbitration. In those cases, however, the Board refers to the trade union’s perception of the arbitration case rather than the merits of such a case. This is done in a context where the facts in issue are both known to the trade union and the employer. In the present case, the facts requested here are *ex hypothesi* not known to the trade union and would only be known by bringing a complaint alleging a violation of section 15 to find out the facts by requesting the kind of production order requested here. In my view the problem in the present case stems from the complainant’s characterization of the defence raised by the trade union and perhaps the employer in this case. The proper statement of the defence is that it refers to the facts as they were known or ought to have been known by the trade union, that is the extent of the relevant evidence on that issue. The merits of the dispute are not “a defence” and insofar as they are tendered in evidence they simply become part of the context in which the respondent trade union’s conduct is to be assessed. The materials requested by the complainant at this point were not known to the union and would only have been known if proceedings were instituted. These materials would not go to the issue of the trade union’s “state of mind” when it declined to bring such proceedings and such hindsight as to the merits or possible outcome of such proceedings would not be relevant to the present case before the Board.

8. For these reasons, therefore, the complainant’s request to direct the production of documents is denied.

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**2279-84-R** Labourers International Union of North America, Local 527, Applicant, v. **Ferano Construction L.T.D.**, Respondent

**Certification — Practice and Procedure — Reconsideration — Employer not filing reply to certification application — Writing to Board requesting re-opening after certificate issued — Claiming Board correspondent sent by registered mail was not accepted by company — Party refusing to accept mail from Board acting at own peril — No reconsideration**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and I. Stamp.

**DECISION OF THE BOARD;** January 9, 1985

1. In a decision dated November 29, 1984, the Board issued certificates to the applicant pursuant to section 144(2) of the *Labour Relations Act*. The application for certification was filed on November 16, 1984, and the terminal date fixed for the application was November 27, 1984.

2. In a letter to the Board dated December 11, 1984, the respondent has stated as follows:

*Re: Labourers International Union of North America Local 527, and Ferano Construction Ltd.*

This letter will acknowledge receipt of the certificates dated November 29, 1984 pursuant to the provisions of the *Labour Relations Act*.

On reviewing the decision of the Board, I have a very strong suspicion to question the evidence that was submitted to the Board in support of its findings as set forth in paragraph 6 of the Board's decision. According to the corporate records of the company there were five employees in the employ of Ferano Construction Ltd. on November 27, 1984 who could properly be classified as construction labourers, namely:

1. Roco Flocari,
2. Mario Basile,
3. Gordon Ashawasagi,
4. Mike Liberty,
5. William Cuglietta.

Prior to that one Andy Delorenzo was discharged from employment on November 16, 1984.

I am submitting this letter on behalf of Ferano Construction Ltd. in support of an application to set aside the certificates of the Board and to re-open the application of the Labourers International Union of North America, Local 527 to permit the company to reply to it.

Moreover, the Company did not employ common labourers in the residential sector of the construction industry as the company is not involved in residential construction.

The company did not file a reply referred to in paragraph 2 of the Board's decision because the registered mail containing the request for the information was not accepted by the company on the date of its delivery due to the absence of the corporation's controller at its premises on that date.

I appreciate your attention to this matter.

Yours very truly,

FERANO CONSTRUCTION LTD.

Per: "illegible signature"

3. This letter was received by the Board on December 14, 1984. This letter is the only response by the respondent to this application for certification. The respondent has informed the Board that the company did not file a reply to the application because the registered mail containing the request for information was not accepted by the respondent on the date of its delivery due to the absence of the respondent's controller on that date. In *Norben Interior Design Ltd.*, [1984] OLRB Rep. June 851, the Board stated that where a business address is provided for the public, the party which has provided that address ignores and fails to advise itself of correspondence does so at its peril. In the instance the respondent refused to accept a registered letter which bore the name and return address of the Board. By its conduct the respondent has chosen to ignore and has failed to respond to a communication from the Board. In addition, the respondent has also chosen not to respond to this application for certification in a timely manner within the time limits fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. The respondent is the author of its own misfortune. The respondent had an opportunity to file a reply which could have been considered by the Board. The reason given by the respondent for not accepting delivery of the registered mail from the Board, in our opinion, is not a ground for permitting the respondent to in effect re-open this application for certification after the consideration of this application and after the issuance of the certificate by the Board. The Board notes that the letter dated December 11, 1984, was mailed some two weeks after the terminal date of this application.

4. In proceedings under the *Labour Relations Act*, the Board is governed by the Act and the Regulations under the Act. Provision is made in the Rules of Procedure for the filing of a reply by the respondent. The respondent did not file a reply to this application and now seeks to have the Board re-open the application at the respondent's leisure. Under the Rules of Procedure, the respondent was required to file its reply no later than the terminal date fixed for this application, namely, November 27, 1984. In proceedings before the Board there is a need for finality and, to this end, the Rules of Procedure under the Act provide for the appropriate time when a respondent is required to make its position known to the Board. It is not open to the respondent to refuse mail, to wait until the certificates have been issued, and then to present the Board with a set of facts which could have been presented in a timely manner.



For these reasons, the Board is not prepared to set aside or reconsider its decision in this matter pursuant to section 106(1) of the Act.

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**1352-83-U United Steelworkers of America, Complainant, v. John T. Hepburn, Limited, Respondent**

**Discharge for Union Activity — Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — Grievor discharged for alleged picket line misconduct — Whether discharge motivated by grievor's union activity — Refusal to arbitrate discharge not bad faith bargaining — Finding of interference on basis of non-motive approach in *International Wallcoverings* not made in circumstances**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**APPEARANCES:** *Brian Shell, George Teal and Carlos Infusino for the applicant; Stewart D. Saxe, John F. Hepburn and William Hutchison for the respondent.*

**DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; January 31, 1985**

1. The United Steelworkers of America has been bargaining agent for employees in the respondent's Mechanical Division since 1943. In the spring of 1982 it was negotiating with the company for the renewal of the collective agreement covering those employees. A majority of the employees present at a union meeting on May 17, 1982, voted to reject the company's most recent contract offer. In the circumstances, that vote was generally understood to be a mandate for and commitment to a strike. One of those who voted to reject the company's offer was Harry Morgan. Despite that, Harry Morgan was not prepared to join in the strike. While his fellow workers endured the hardships of a strike in the hope of improving wages and working conditions for all, Harry Morgan planned to continue working and receiving his wages. If the strike resulted in improved wages and benefits, he was prepared to donate the difference to charity. He wasted no time telling the union's leaders of his plan — he did so before he left the meeting of May 17th. The news was not warmly received.

2. The strike began the next day, May 18, 1982. The grievor, Roderick Smith, was head picket captain. He had been employed by the respondent since June, 1977, as a fitter welder or fabricator. He was promoted to lead hand before the end of his probationary period, and later turned down a further promotion to foreman, which would have taken him out of the bargaining unit represented by the union. He was shop steward for his area from 1979 or 1980 until shortly before the 1982 strike began. He was also a member of the health and safety committee during roughly the same period. He ran unsuccessfully for Vice-President of the local in 1981, and was a member of its bargaining committee in the 1982 negotiations. He was assertive in his dealings with his employer on union matters, health and safety matters and personal matters. He had been disciplined on several occasions. More than once it was for defiant behavior: participating in an illegal strike, interfering with production, telling John Hepburn, then Manager of Manufacturing, that his uncle James Hepburn, Vice-President of

the respondent, was “an ignoramus”. Smith’s grievances of the discipline imposed as a result of the latter two incidents were unresolved when the 1982 strike began; their resolution had then become the subject matter of collective bargaining in accordance with the parties’ practice.

3. The respondent continued to operate during the strike. Work ordinarily performed by employees represented by the union was performed by management personnel and by strike replacements hired from or through an outside agency, and by Harry Morgan. As these people drove their automobiles through the picket line each day they received the expected treatment. Harry Morgan received perhaps more than his proportionate share of attention; he was the only pre-strike bargaining unit employee crossing the picket line at that plant. At first, Morgan took the verbal exchanges of the first weeks of the strike in his stride, along with the nails that had to be removed from in front of his tires from time to time. His experience on the morning of June 11th, however, was different. As Morgan was driving slowly past picketers into the Hepburn plant, Roderick Smith reached through the open window of Morgan’s automobile, handed Morgan a .22 calibre bullet, said “your name’s on this, you bastard!” and, a moment later, spat in Morgan’s face.

4. After Morgan reached the respondent’s parking lot and parked his car, he entered the plant and went to the washroom to wash his face. He says he felt “emotionally sick”. He could not believe someone could “go that low”. He went to find his superior, Mr. Baxter, to report the encounter with Smith. This was the first time he had sought management out to report a picket line encounter. He found Baxter, told him what had happened, and gave him the bullet. Baxter spoke to John Hepburn, who asked that Morgan put his report in writing. Morgan did that. Hepburn sought legal advice, then called the police. Constable Gaskin of the Peel police department came to the plant and met with Hepburn and Morgan. He was given the bullet. He told Morgan that the most serious possible charge which might be made against Smith as a result of the incident involved a possible prison term. Morgan said he did not wish to press such a serious charge. The charge eventually laid by Morgan was common assault.

5. John Hepburn regarded the incident as serious. He described it as involving a threat to an employee’s life. He felt the company could not tolerate that kind of behavior. He was generally aware of Smith’s discipline record, particularly the incidents which were still the subject of grievances when the collective agreement expired. On the basis of that record, he considered Smith a difficult employee who was disrespectful of supervision. The day of the incident, June 11th, was a Friday. In the period between the incident and the afternoon of the following Monday, John Hepburn spoke to the company’s labour counsel, his father and uncles, and the two other senior management people on the company’s negotiating committee. He decided to terminate Smith’s employment, and wrote to Smith to that effect on June 15th. He candidly admits recognizing at the time that, in view of Smith’s position in the union, the termination would make it more difficult to settle a collective agreement with the union. He denies using the incident as a pretext for ridding the company of what counsel for the union described as “a vocal and sometimes angry [union] spokesperson”.

6. The union responded to the termination letter with a written grievance. The company took the position it was not obliged to respond to the grievance, as no collective agreement was then in effect. The union demanded Smith’s reinstatement as a term or condition of any new collective agreement. The respondent refused to agree either to that or to arbitration of the question whether the discharge was for “just cause”. On November 18, 1982, the union agreed to contract terms which did not require either Smith’s reinstatement or arbitration of his discharge grievance. Smith had consented to the union’s withdrawing those demands. A

memorandum of agreement was signed after the union provided a telegram confirming that those demands had been withdrawn. That was not the end of the dispute over Smith's discharge, however. The turns it then took are described in the Board's earlier decision in this matter at [1984] OLRB Rep. Jan. 39, 5 Can. LRBR (2d) 340 at paragraphs 3 and 4:

3. The complainant nevertheless filed a grievance on Smith's behalf on November 23, 1982. The respondent's immediate response was that there was no collective agreement in effect as of the time of the termination, and that the termination could not, therefore, be the subject of collective agreement arbitration. The complainant persisted. It advised the respondent it had appointed a nominee to an arbitration board. That nominee then sought from the respondent the name of its nominee. The respondent refused to appoint a nominee. The complainant then asked the Minister of Labour to make the appropriate appointments pursuant to section 44(4) of the Act. Correspondence was exchanged between counsel for the Ministry, the complainant and the respondent concerning the Minister's power to make the requested appointments. On March 22, 1983, the Director, Legal Services, Ministry of Labour advised counsel for the complainant that he would be advising the Minister of Labour that he had no power to appoint an arbitrator under subsection 44(4) of the Act, having regard to the undisputed fact that the discharge took place when no collective agreement was in operation.

4. There were no further developments until after the release by the Board of its August 5, 1983 decision in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316. In late August or early September, counsel for the complainant met with the Director, Legal Services, Ministry of Labour, and ultimately obtained from him a letter which confirmed that the Minister had accepted the advice that counsel had earlier been told would be given to the Minister on the question of power to appoint an arbitrator under section 44(4). This complaint was then filed September 19, 1983, fifteen months after Smith's termination.

7. Constable Gaskin was called as the union's witness. His recital of his meeting with Morgan and Hepburn is consistent with their versions, when one takes into account the inevitable effects of the passage of time between the events in question and the hearing. Gaskin concluded that Morgan did not think Smith would actually carry out his threat. He thought Morgan was more upset about being spat upon than about the bullet. He said Hepburn expressed concern that there was no need for that type of activity, and that he could see no reason why employees who wished to work had to be intimidated in that manner. Hepburn did not encourage or discourage Morgan's pressing charges during the meeting with Gaskin. After his meeting with Morgan and Hepburn, Constable Gaskin went and spoke to Smith. Smith told Gaskin he had not intended to spit on Morgan. He admitted handing Morgan the bullet. Gaskin got the impression Smith regretted the incident, that he thought it was a stupid thing to have done. When Gaskin reviewed the case later with his superiors, he and they concluded that a criminal charge of threatening or intimidation would not be warranted. Hepburn, of course, was privy neither to Gaskin's discussions with Smith nor to his discussions with his superior officers.



8. The union argues that discharge was so disproportionately severe a response to the incident between Smith and Morgan that some other factor is needed to explain it, and that factor is a desire to be rid of a trade union activist. In this connection, the union would have us find that all of the immediate parties to the incident, including Morgan, treated the handing or dropping of the bullet and the accompanying remarks as a joke, and that the spitting was an innocent mistake in which Smith intended to spit on the ground and missed. The first proposition rests on the evidence of Smith and McCaul, who handed Smith the bullet on the picket line as Morgan was driving in that day, that they were laughing when the bullet was delivered and that Morgan also laughed or “sniggered”, as McCaul described it. On a tack inconsistent with this “prank” theory of the incident, counsel for the union put it to the respondent’s witnesses, including Morgan, that Morgan’s attitude and behavior were so provocative that a strongly emotional, even violent, reaction would not be an unnatural result. Having seen and heard Morgan, Smith and McCaul testify about the incident, the word “prank” does not properly describe it. It is apparent, and we find, that Morgan was shaken, not amused. If he laughed or “sniggered”, it was from a combination of nervousness and bravado — “whistling in the dark” — and not from mirth. For his part, Smith did not intend to amuse or entertain; he was angry about Morgan’s “scabbing”, and wanted Morgan to get the message that he was so provoked that physical violence was at least on his mind, if not “in the cards”. We find it hard to believe that the spitting was a mistake.

9. The complainant union argues that the respondent has violated sections 3, 15, 64, and 66 of the *Labour Relations Act*. It submits the respondent’s discharge of Smith was motivated by a desire to rid the company of a union activist, and so violated sections 64 and 66 of the Act. It says the respondent’s subsequent refusal to agree to Smith’s reinstatement or to the arbitration of his discharge grievance was similarly motivated, and so constituted bargaining in bad faith in violation of section 15 of the Act. In the alternative, the union says that the circumstances of this case call for the finding of breach of section 64 if anti-union animus is not found, relying on *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316. It was not suggested that section 3 of the Act created any basis for relief which could not be found in the other sections on which the union relies.

10. Section 66 of the Act provides:

66. No employer, . . .

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

Subsection 89(5) of the Act imposes on the respondent the burden of establishing that its discharge of Smith was free of the motivation referred to in section 66:

- (5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employer’s organization

did not act contrary to this Act lies upon the employer or employers' organization.

11. This onus cast on the respondent by section 89(5) of the Act was described in these terms in *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, at paragraph 17:

... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

In *Fielding Lumber Company*, [1975] OLRB Rep. Sept. 665, at paragraph 19, the Board noted that

... the Board must only be concerned with the motivation of an employer and cannot pass judgement on the fairness of its actions. The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* — a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must also be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.

This "process of inferential reasoning" was discussed in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.*, case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which

is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement of inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

12. This is not the first time in labour relations history that an employer has disciplined or discharged a striking employee for allegedly violent or intimidatory conduct toward those who perform work for the employer during a strike. Such discharges have been the subject of arbitral review when the right to such a review was later won in collective bargaining: see, for example, *Re Mattabi Mines Ltd.*, (1973) 3 L.A.C. (2d) 344 (Abbott), *Re Gates Rubber of Canada Ltd.*, (1978) 18 L.A.C. (2d) 412 (O'Shea) and *Re Radio Shack*, (1980) 26 L.A.C. (2d) 226 (Beck). An employer's interest in the safety and well-being of those who work for him are well recognized, as is the validity of the proposition that

... the mere fact that an employee is engaging in a lawful strike does not give him licence to commit acts of misconduct which would not otherwise be tolerated by his employer. (*Re Gates Rubber of Canada Ltd.*, *supra*, at p. 418).

The complainant does not suggest that an employee who engaged in violent or intimidatory conduct on a picket line is immune from employer discipline. The primary basis of its complaint is that the discharge in this case was motivated by the grievor's union activity.

13. The evidence establishes that Roderick Smith was active in and for the union. This union has represented employees in the respondent's mechanical division for nearly 40 years when Smith was discharged. There is no evidence before us from which we can conclude that the respondent has ever before been guilty of an unfair labour practice toward any other union "leader", past or present. The union does not suggest that Roderick Smith is the first vocal, angry or effective leader this local has ever had, nor that he is first the company might have regarded as a "thorn in its side", if it were inclined to think in such terms. Indeed, there is no suggestion that he was the most formidable or "thorny" of the local's current leaders, elected or otherwise, at the time he was discharged. We do not accept, as he would have us believe, that the company's then recent conversion to lead-free paint was solely due to Smith's activities, or that his role in the decision to convert was quite the relentless personal battle he sought to portray in his testimony.

14. One other striking employee was discharged during the strike, in his case for throwing a rock through James Hepburn's office window at a time when Hepburn was not, but might have been, there. John Hepburn explained that these two incidents were considered life-threatening, and that they were the only such incidents during the strike. The union does not claim that the other discharged employee was terminated for anti-union reasons. Indeed, that accusation was not leveled at the company with respect to the Smith discharge until fifteen months after it occurred.



15. In assessing whether anti-union motive played a part in the respondent's decision to discharge Smith, it is of little assistance to speculate whether a dispassionate third-party arbitrator would have substituted lesser discipline for Smith's behavior, or to assess whether the incident warranted a criminal prosecution or otherwise measure its seriousness from the perspective of a police officer. We do find it helpful to ask whether it seems likely that the Hepburn's would have discharged the perpetrator if he were not a "union leader". McCaul's testimony is helpful in that respect. He is the striking Hepburn employee who handed Smith the fateful bullet. He acknowledged that was a stupid thing to do, volunteering "if I'd thrown it, they would have fired me". The next question in cross-examination gave McCaul a chance to back-track: "You expect they would have fired you . . . [had you been the one to give Morgan the bullet]?" He answered "if they would do that with him, why not with me?" It was not suggested that McCaul had had any leadership role in the union. It is apparent it had not occurred to him, despite the circumstances in which he was testifying, that anything other than the handing of the bullet had resulted in Smith's discharge. This alone is strong evidence that the reason given by the respondent for its termination of Smith is plausible, whether or not it is just.

16. The respondent was and is under no obligation to establish that it had just cause for discharging Smith. It was and is under no obligation to agree to submit that question to arbitration, or to submit to an arbitrator's view of the propriety of discharge as a response to the incident of June 11, 1982. It is obliged to persuade us that its decision to discharge Smith was free from improper motive. That requires not only that we be persuaded that the reason given is a plausible reason for the respondent's having discharged the grievor, but also that we be satisfied that it is the only reason. The respondent is not required to satisfy us beyond a shadow of a doubt, however. Given the nature of labour relations and the Board's experience of human behavior in that context, it would be a formidable, if not an impossible task for an employer in the respondent's position to so completely prove a negative as to persuade the Board that it was quite impossible for it to have been influenced by even the slightest negative feeling about the union and those who support it. That is not what subsection 89(5) requires. The onus imposed by that subsection is the civil onus: proof on a balance of probabilities. On the facts of this case, we are satisfied it is more probable than not that the respondent's decision to discharge Smith was not a response, even in part, to Smith's union activities.

17. As we understood the union's submission, a finding that the respondent violated section 15 of the Act depended on our finding that the respondent's decision to discharge Smith was a response, in whole or in part, to Smith's union activities. We have not made that finding.

18. The complainant's alternate argument was that the discharge of Smith interfered with the union and so violated section 64 if the discharge was not improperly motivated. The sole authority cited for this non-motive approach was *International Wallcoverings, supra*. We do not propose to enter into a lengthy analysis of the decision in that case. The distinctions between the facts on which the Board acted in that case and the facts before us are stark. The most obvious is that Smith did do what the respondent thought he had done when it decided to discharge him. In that respect he is in the same position as the three grievors to whom the Board unanimously refused to grant relief in that case, observing at paragraphs 36 and 37 that:

The respondent was under no legal obligation to arbitrate the discharges and trade union officials who engage in misconduct have no immunity from discipline under the Act . . .

We have found that, given the circumstances, the decision to discharge was not clearly excessive and by itself a hallmark of anti-union animus. The decision to arbitrate merited no different characterization. . . . In this type of situation it seems to us that a non-motive approach to section 64 should be reserved for instances of clear mistake or for discipline clearly out of all proportion to the misconduct in issue.

The facts of this case do not fall within the range prescribed in the last sentence of the quoted passage. However valid the non-motive approach of the *International Wallcoverings* case may be, it clearly does not bear application to this complaint.

19. The complaint is, accordingly, dismissed.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I dissent from the majority decision. In my view, it has not been established that the Company's discharge of Mr. Rodney Smith was free of anti-union motive.

2. Smith's problems with the Company began in 1978, when he rejected their offer to become a foreman, and as the Company put it, "be on their side." That Smith did a good job is indicated by his promotion to lead hand, and the subsequent offer of the foreman position. Nevertheless, for his own reasons, Smith chose to remain in the bargaining unit. Indeed, he went on to become quite active in the union as the majority notes. He served as shop steward until shortly before the strike began; he was a member of the plant health and safety committee; and he ran unsuccessfully for the position of local Vice-President in 1981. Smith served as a member of the bargaining committee during the 1982 negotiations, and when the strike commenced, served as picket captain. I cannot imagine anyone being more involved in his union. In these circumstances, the Board must be completely satisfied that no anti-union motive existed. I am not so satisfied.

3. As the Board stated in the *Barrie Examiner* case *supra*, the onus cast on an employer under section 89(5) is twofold. The employer must establish not only that the reasons given for discharge are the only reasons, but also that these reasons are not tainted by any anti-union motive. The Board, in *Pop Shoppe*, *supra*, reiterated this approach, stating that:

Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive.

4. How do these principles apply to the facts in this case? It is clear that Smith did a good job for the Company. It is also clear, however, that notwithstanding his abilities, Smith had been disciplined on several prior occasions: he had participated in an illegal strike; had interfered with production; and had called Company Vice-President James Hepburn "an ignoramous." The evidence establishes that management had a personal dislike for Smith, although John Hepburn would not admit it. Despite the Company's earlier offer of promotion, he described Smith as "not a good worker; difficult." When asked, point blank, whether he disliked Smith, Hepburn would say only that "he was a difficult employee." The question for the Board is whether this dislike is related to Smith's union involvement.

5. To say the least, Smith was zealous in pursuit of union objectives. He participated in a prior illegal strike. He had been active in a long running battle with the Company to improve working conditions by using lead-free paint. And he was a vocal member of the bargaining committee. He recommended strike action to the membership, and subsequently served as a picket captain. Management was aware of this. The question whether Smith was the first formidable or “thorny” local union leader is, in my view, irrelevant. The Company’s dislike for Smith was exacerbated by the manor in which Smith conducted himself in dealing with union matters. In my view, a violation of section 66 has been established.

6. The facts that the Company relies on in support of its decision to discharge should be examined. It is clear that Smith handed Mr. Harry Morgan a bullet, and said “your name’s on this, you bastard,” and that he then spat on Morgan’s face. It goes without saying that I do not condone Smith’s picket line actions. Unfortunately, tempers on the picket line can flare, and incidents like this do occur. The question for the Board, however, is whether this conduct, and this conduct alone, is the reason for the Company’s action. The majority asks whether the Company would have discharged the perpetrator were he not a union leader, and I agree that this is a relevant consideration in determining whether anti-union animus exists. I disagree, however, with the means used by the majority to answer this question. The majority relies on the testimony of another employee, McCaul, who handed Smith the bullet. McCaul testified that “if I’d thrown it (the bullet), they would have fired me. . . if they would do that with him, why not me?” The majority remarks that this is “strong evidence” that the Company’s explanation for Smith’s discharge is “plausible, whether or not it is just” (at paragraph 15). In my opinion, the majority has made a bad inference from McCaul’s testimony. With respect, McCaul’s perception is of little relevance given the onus on the Company to disprove the existence of any anti-union animus. The majority’s reasoning begs the question: Would McCaul’s testimony be “strong evidence” if he had said that the Company would *not* have fired him if he had been the perpetrator? In my view, the answer is clearly “no.” It is the Board’s duty to determine whether anti-union motivation is present, and I cannot see how the opinion testimony of an uninformed employee can aid the Board, let alone provide “strong evidence.”

7. In my opinion, the extent of the Company’s overreaction to the incident also leads one to infer that anti-union motivation was involved. In this vein, I disagree with the majority’s characterization of the evidence. At worst, Smith spit on Morgan. As for the bullet incident, I note that it was not premeditated, and that it was viewed by Constable Gaskin as an unfortunate incident — one that Smith regretted. Constable Gaskin, in a better position to appreciate the incident than the Board, thought Morgan was more upset about being spat upon than about the bullet incident. It is important to note that neither Gaskin nor his superiors felt that a criminal charge was warranted in the circumstances. All in all, then, an unfortunate incident, one which was not serious enough to result in criminal prosecution, but one which the Company would have us believe is the sole justification for Smith’s dismissal.

8. I would have found a breach of section 66 and reinstated the complainant Rodney Smith, with compensation for lost wages subject to perhaps a one week suspension, which in my view is more than sufficient punishment for his actions.

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**0289-84-R** Paul Winter, Applicant, v. Ontario Sheet Metal Workers Conference, Respondent, v. **Julian Roofing (Ontario) Limited**, Intervener

**Certification — Petition — Company president providing objector with name of lawyer to the knowledge of employees — Extraordinary Saturday morning meeting held on company premises to discuss petition — Whether petition voluntary**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members W. H. Wightman and P. J. O'Keeffe.

**APPEARANCES:** *M. G. Horan and Paul Winter for the applicant; L. Steinberg, G. Ward and O. Pettipas for the respondent; Michael Gordon, J. M. Minialoff, Wilf Krug and Charles Spiars for the intervener.*

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER P. J. O'KEEFFE; January 28, 1985**

1. The name of the respondent is amended to read: "Ontario Sheet Metal Workers Conference".

2. The applicant has applied for a declaration terminating the bargaining rights of the respondent. Having regard to the representations of the parties, the Board finds that this application for termination of bargaining rights which has been made pursuant to section 57 of the *Labour Relations Act* is timely.

3. Having regard to the representations of the parties, the Board further finds that in this application the bargaining unit represented by the respondent is all employees of Julian Roofing (Ontario) Limited engaged in the application of roofing, damp-proofing, waterproofing on all types of structure with all types of materials in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

4. Initially the respondent raised an objection with respect to the application of section 1(4) of the Act and alleged that the intervener, PLS Enterprises and Northern Roofing (1972) Limited were associated or related companies under common control and direction which operated businesses in the sheet metal and roofing trades. Having regard to the decision of the Board in *Milltronics Limited*, [1980] OLRB Rep. Jan. 56; *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844; and *Jervis B. Webb Company of Canada, Ltd.*, [1983] OLRB Rep. Sept. 1484, the Board finds that the appropriate employer is the intervener named in this application and that the bargaining unit referred to above consists of employees of the intervener.

5. The applicant gave evidence that he is a truck driver employed by the intervener and is a member of the bargaining unit. The applicant, in the course of his employment, delivers materials to job sites and also spends varying amounts of time on the roof with the roofers. About ninety per cent of the members of the bargaining unit are Portuguese. The applicant testified that the members of the bargaining unit discussed the shortage of work for them in January and February of 1984, and made comparisons with employees of non-unionized employers in the same line of work as the intervener. The applicant and Manuel Tome, a roofer

in the bargaining unit, informed the Board that it was their belief that they worked fewer hours than the employees of non-unionized employers in the same line of work as the intervener.

6. The applicant decided in April of 1984 that he would find out what steps could be taken in order to terminate the bargaining rights of the respondent. He spoke to his superintendent, Wilf Krug, and asked him whether it would be to the employees' advantage to "get out of the union". The applicant testified that Mr. Krug told him that he did not know whether it would be to the advantage of the employees to get out of the union and that it would be fifty-fifty. The applicant explained that it would mean that the intervener might lose some work and pick up other work. Mr. Krug informed the applicant that he knew very little about the steps to be taken. The applicant suggested to Mr. Krug that he would speak to Joe Minialoff, the president of the intervener. The applicant and Mr. Krug agreed that this would be the route to take because Mr. Krug did not know much about it. The applicant informed three or four members of the bargaining unit what had occurred and told them that Mr. Krug suggested that he see Mr. Minialoff.

7. Within two days of this meeting with Mr. Krug, the applicant travelled from his base of employment in the Hamilton area to meet Mr. Minialoff in Toronto. The applicant, who does not have regular day-to-day contact with Mr. Minialoff, decided to visit him during working hours. It is not unusual for the applicant to visit Mr. Minialoff's office and he arrived unannounced. The applicant informed the Board that Mr. Minialoff did not seem to be expecting him. He asked Mr. Minialoff about getting out of the union and whether it would be a good thing or a bad thing. Mr. Minialoff gave him basically the same answer that Mr. Krug had given him, namely, it did not make much difference and said that the intervener might gain some work and lose some work. The applicant asked Mr. Minialoff how the employees could get out of the union. Mr. Minialoff said that he did not know how to get out of the union but that he would find out and assumed the applicant would need a lawyer to get out of the union. The applicant informed the Board that he told Mr. Minialoff that he did not know a lawyer and that Mr. Minialoff had said, in effect, that he should not worry and that he would find one.

8. Mr. Minialoff gave evidence that the applicant asked him to find the name of a lawyer. Mr. Minialoff said that he would deal with the Winter (no relation to the applicant) law firm (the law firm which appeared at the hearing before the Board on behalf of the intervener) and contacted that firm. He was given Mr. Horan's name and telephone number. Mr. Minialoff then telephoned the office of the intervener and left a message with the wife of Mr. Krug. The message contained Mr. Horan's name and telephone number. Mrs. Krug apparently noted the message and it was left for the applicant in the location where he usually collects messages. A day or two later on April 18, 1984, the applicant telephoned Mr. Horan.

9. On Saturday, April 21, 1984, the employees who are in the bargaining unit met at the intervener's shop. They had been advised of this meeting, which was not held during their hours of work, by the applicant. The meeting commenced between ten and eleven o'clock in the morning and lasted between half an hour and an hour. The purpose of the meeting was to discuss the proceedings up to that point and to discuss the progress of the application to "decertify" the respondent. The applicant testified that he decided to call the meeting on April 21 because it seemed like the most convenient time with all of the employees in their homes. He did not ask Mr. Krug if he could use the premises and explained that he had a key to the gate of the premises and a key to the shop. All of the employees attended the meeting and the applicant told them that they had a lawyer and that he was going to get in touch. The applicant

suggested a fee and told the employees that they would need about a hundred dollars each. Money did not change hands at the meeting. Questions were asked about how soon it would happen. The applicant was unable to inform the Board of all the questions and concerns aired at the meeting because much of the conversation was in the Portuguese language and the applicant speaks very little Portuguese. While a Portuguese interpreter was not present, the applicant expressed the view that the employees helped each other to understand what was going on at the meeting.

10. The applicant gave evidence that none of the employees asked if he had permission for the meeting to be held on the intervener's shop on a Saturday, that it was not unusual for him to be there on a Saturday and that in fact he had on the previous Saturday used the shop to fix a tire on his personal car. In the seven years that Mr. Tome has been employed by the intervener, there has never been a meeting at the shop on a Saturday. While the applicant believed that the employees have keys to the premises, he did not know whether they in fact have keys. On April 28, the applicant visited Mr Horan's office and Mr. Horan wrote the heading on the statement of desire. The applicant, after receiving instructions from Mr. Horan, drove his truck containing the intervener's supplies from Toronto to Ottawa where six of the intervener's employees were working on a job. The applicant delivered the supplies to the job in Ottawa and visited the six employees in their motel where he obtained their signatures. In cross-examination, the applicant stated that he had told the employees that Mr. Minialoff had given him the name of the lawyer after they had signed the statement of desire. No reason was advanced as to why the applicant would tell the employees that Mr. Minialoff had given the applicant the name of Mr. Horan after they had signed the statement of desire rather than before they had signed. Notwithstanding the confusion on this point, the applicant testified that during the meeting at the shop on April 21, he told the employees that Mr. Minialoff had given him a lawyer's name. When the employees had signed the statement of desire, the applicant sent it by courier to his wife in Grimsby. The remaining employee, Manuel Tome, who was working in the Hamilton area, collected the statement of desire from the applicant's wife, signed it and delivered it to Mr. Horan.

11. It is for the Board to determine whether the statement of desire represents the voluntary wishes of the employees who signed it. The critical areas in this regard are the providing of the name of a lawyer by Mr. Minialoff to the knowledge of the employees and the effect of holding an extraordinary meeting of the employees in the intervener's shop on a Saturday morning. In assessing the circumstances under which a statement of desire was originated, prepared and circulated, the Board looks to all of the surrounding circumstances. As the Board stated in *Pigott Motors (1961) Ltd.*, 63 CLLC ¶16,264, at page 1129:

*The Labour Relations Act* contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.

There are certain facts of labour-management relations which this Board has, as a result of experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own



choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

12. The mere knowledge of management that an employee is considering opposing a trade union is not in itself indicative of management support which would cause the Board to find that a resulting statement of desire does not represent the voluntary wishes of the employees who signed it. See, for example, *Charles Wilson Limited*, [1979] OLRB Rep. Jan. 20. In *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, the Board stated at page 1408:

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

In the instant case the applicant gave evidence that Mr. Minialoff told him he would need a lawyer and that when the applicant replied he did not know a lawyer, Mr. Minialoff told him not to worry and that he would find one. In fact, Mr. Minialoff did provide the applicant with the name and telephone number of Mr. Horan. The applicant testified that he told the employees that he had spoken to Mr. Krug and Mr. Minialoff and that Mr. Minialoff had got them a lawyer. In our opinion, the conveying of this information to the employees would convey to them the involvement and co-operation of Mr. Minialoff and the indication to them would be that Mr. Minialoff was not indifferent to representation by the respondent. Informing the employees of the role which Mr. Minialoff played in connecting the applicant to a lawyer was underscored by making the announcement of the meetings between the applicant and Mr. Krug and Mr. Minialoff at an extraordinary meeting on a Saturday in the intervener's shop. In our view, this choice of venue by the applicant to accommodate a modest group of eight employees

highlighted the support of management for the proposed action of taking steps to terminate the bargaining rights of the respondent. In this case, the act by Mr. Minialoff of finding a lawyer to represent employees was conveyed to the employees who signed the statement of desire and we find that the intervener's conduct as conveyed to the employees by the applicant and the conduct of the applicant have abridged or interfered with the rights of the employees other than the applicant to voluntarily express their wishes in this matter.

13. On the basis of the evidence before the Board, we are satisfied that less than forty-five per cent of the employees of Julian Roofing (Ontario) Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent on May 9, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the said Act.

14. This application is dismissed.

#### DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. The first ten paragraphs of the majority decision accurately reflect the evidence as I heard it from the witnesses Winter and Minialoff. Moreover, I accept their versions of the events based on their credibility as witnesses under direct and cross-examination, and combined with the fact that the union called no evidence. I believe the petitioners simply concluded that the union had priced them out of the market for much of the available work and that they viewed ridding themselves of the union as a means of making their company more competitive. I disagree with the majority in finding that Mr. Minialoff "abridged or interfered with the rights of the employees *other than the applicant* to voluntarily express their wishes in this matter". (my emphasis).

2. The *Pigott Motors (1961) Ltd.* case, *supra* merits some comment, particularly with respect to the "facts of labour-management relations which this Board has, *as a result of experience in such matters*, been compelled to take cognizance". (again, my emphasis).

3. As the Board states: "One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with this employer" is equally startling as were the Board to announce that there are still some Buddhists who, for whatever reason, have not yet attained nirvana! Surely the very existence of labour legislation suggests that our elected representatives are at least dimly aware of this revealed truth and have hence concluded there is a continuing need for these laws which establish ground rules for the employer/employee relationship even in those situations where the Government itself is the employer! The laws attempt to meet this need to protect the rights of employees in their freedom of choice by taking the matter out of the hands of the employer and placing it before this Board with its not inconsiderable powers to deal forcefully with any employer who might be so unwise as to penalize employees for exercising their rights.

4. Consider for a moment the circumspection and vigilance, alluded to in the opening paragraph of the *Pigott* quotation, vis-a-vis the "detailed provisions (of the *Labour Relations Act*) designed to protect the rights of employees to become members of, and to select or reject

a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer". Do these provisions seem real or illusory to employees of union-free company "A" who, without having a say in the matter, learn they must now pay dues to and be represented by a trade union representing employees of company "B" because of common ownership or control (section 1(4)) about which the employers of company "A" know nothing? Do the provisions seem real or illusory to employees of many years standing in a construction company who learn they must now join and pay dues to a trade union, or lose their jobs, because their employer undertook work in another area and under circumstances which brought the company under the terms of a provincial union agreement (section 144)? Do the provisions seem real or illusory to employees who accept employment with a company engaged in a new approach to marketing only to find later that they are represented by a union because their company purchased or leased property from a company which had failed in a similar type of enterprise (section 63)?

5. In each of the foregoing cases it is at least arguable that the individual employees would fail to see their rights of freedom of choice and freedom of association as having been afforded real protection. There is a rationale, based in part on the perceived desirability of stability in labour relations, for each of the above. The price for achieving this stability, unstated in the *Pigott* quotation, is an unwarranted and improper assumption that individual rights and union rights are identical. (This is written at a time when one Arthur Scargill of the National Mine Workers Union seems intent on proving to the United Kingdom, if not the world at large, that both the rights and interests of individual workers and their union can be mutually exclusive.)

6. Nowhere in the overall scheme of labour-management relations is the primacy of the institutional interest of unions over those of the individual so evident as in the processes of certification and decertification. The Board can and, in most cases, does grant outright certification or deny outright an application for decertification. In contrast, the prayer of petitioners, even if heeded, can only result in a vote regardless of their numbers. Stated simply, if six out of ten employees submit an application and union membership cards, the union will be certified outright. If the same six individuals change their minds and submit written retractions in the form of a petition, the most they can hope for is a Government-supervised secret ballot vote to determine "the true wishes of the majority" and then only after having successfully withstood a searching examination of their petition leaving the Board no room to speculate, as in the instant case, as to what was in the minds of those who signed but, for obvious reasons, rarely appear to testify.

7. The primary expertise of the Board is in the areas of interpretation and articulation of labour *law*. Its tri-partite composition reflects a desire on the part of the legislators to incorporate in Board decisions the practical knowledge of labour *relations* which members with either or trade union or management background can bring to it. But the Board possesses no built-in capacity for research of a nature which would permit it to do "tracking studies" for purposes of assessing the true consequences of its decision. It is not for me to say whether such research should be done or, if so, by whom. In the absence of such research, however, it is not for us as a corporate Board to presume what those consequences have been or may be. With or without research no doubt the public makes its own judgement as to whether the path we have been following has been one of improvement or of deterioration.

8. I take strongest issue with the assertion in *Pigott* that "the Board has discovered in a not inconsiderable number of cases that management has interfered with the free exercise



by employees of their rights under the Act" (my emphasis). The "not inconsiderable number" is considerable only because of the numbers of cases wherein by post hoc fallacy the Board has concluded that working people cannot be relied upon to speak for themselves even in the privacy of a secret ballot. Such a perception is not only patronizing and condescending to the individuals involved, it also denigrates the institutional cornerstone of democracies, free and secret ballot voting.

9. These petitioners are unlikely to have the money required to appeal their case to the courts. Even if they did, the discretionary powers given to us under the Act would likely prompt the court to dismiss the appeal on the grounds, as it has in a number of instances, that the tribunal has a "right to be wrong".

10. For what little comfort it will give him, I cannot deny the applicant's assurance that I see in this decision a denial of natural justice and that I would have ordered a vote as requested.

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**2674-84-R Ontario Public Services Employees Union, Applicant, v. Niagara South Board of Education, Respondent**

**Bargaining Unit — Representation Vote — Parties to prehearing application agreeing to voting constituency excluding "persons covered by subsisting collective agreements" — Wording of exclusion posing potential difficulties — Board describing constituency with exclusion of employees in bargaining units for which any trade union held bargaining rights as of the application date**

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members J. Wilson and H. Kobryn

**DECISION OF THE BOARD;** January 25, 1985

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

4. The parties agreed upon the following voting constituency:

all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, the secretary to the superintendents of Program, the secretary to Business Affairs, the secretary to Special Services and Operations, the Recording Secretary, the Staff Relations Secretary, the Administrative Clerk-Benefits, the Administrative Assistant to the Director of Education, persons

above the rank of Administrative Assistant, occasional teachers and persons covered by subsisting collective agreements.

5. The Board notes that the applicant requested and the parties agreed to exclude "persons covered by subsisting collective agreements" from the voting constituency. The applicant did not identify those collective agreements in its application, nor does it appear from the Labour Relation Officer's report of the parties' meeting that the parties specifically identified those agreements.

6. Three collective agreements to which the respondent was a party were filed with the Board, although they are not referred to in any of the other documents that had been filed. Those agreements all have a nominal expiry date of December 31, 1984, so it would appear that they were not subsisting collective agreements as of either January 3, 1985, the application date or January 16, 1985, the date upon which the parties met and agreed to the voting constituency.

7. It appears that the parties have agreed on the parameters of the voting constituency as is evidenced by their having established a voter's list, and having agreed on the description of the voting constituency. However, in our view, the description of the voting constituency is imprecise. The parties should consider the desirability of continuing to describe the exclusions from the voting constituency and the bargaining unit by reference to "persons covered by subsisting collective agreements". It is apparent to us that the parties seek to exclude from this application those employees for whom another union holds bargaining rights. We believe that the scope of this exclusion should not be dependent upon what is done by persons or unions that are not a party to this proceeding. (See *The Wellesley Hospital Limited*, Board File No. 2562-84-R, as yet unreported, decision dated January 14, 1985.) In view of the potential difficulties that may arise if, for example, the bargaining unit in one or more of those agreements is amended, or the bargaining rights of the union which is a party to one of those agreements is terminated, it appears to us that it would be prudent for the parties and the Board to specifically designate the excluded employees, or at the very least, specifically identify the collective agreements to which the parties are referring when the term "persons covered by subsisting collective agreements" is used in a bargaining unit description. Therefore, at this point, we believe that in place of using the term "persons covered by subsisting collective agreements" in the description of the voting constituency, the exclusion should read: "employees in bargaining units for which any trade union held bargaining rights as of January 3, 1985." The application date was January 3, 1985 which is the date as of which the bargaining unit determination should be made.

8. Having regard to the foregoing, the Board directs a representation vote in the following voting constituency:

all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, the secretary to the superintendents of Program, the secretary to Business Affairs, the secretary to Special Services and Operations, the Recording Secretary, the Staff Relations Secretary, the Administrative Clerk-Benefits, the Administrative Assistant to the Director of Education, persons above the rank of Administrative Assistant, occasional teachers and employees in bargaining units for which any trade union held bargaining rights as of January 3, 1985.

9. All employees of the respondent in the voting constituency on the 16th day of January, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between the 16th day of January, 1985, and the date the vote is taken will be eligible to vote.
  10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
  11. The matter is referred to the Registrar.
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**2953-83-M** The International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario, on its own behalf and on behalf of the International Brotherhood of Electrical Workers Local Union 1788, Applicant, v. The Electrical Power Systems Construction Association (EPSCA) and **Ontario Hydro**, Respondents

**Construction Industry Grievance — Collective agreement requiring employees to remain at assembly point until quitting time to be entitled to daily travel allowance — Grievor leaving point few minutes early denied allowance — Clause not imposing penalty but settling out how allowance earned — Failure to comply disentitling grievor**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and W. H. Wightman.

***APPEARANCES:** A. J. Ahee and W. Gilroy for the applicant; Paul Jarvis and John Tomlinson for the respondents.*

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; January 30, 1985**

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The applicant has alleged that the respondents have wrongfully withheld the daily travel allowance as set out in Article 1100 of the collective agreement from Mr. Warren Bray for part of the pay period ending February 15, 1984. Initially, the applicant took the position that the respondents had wrongfully withheld 0.1 hours of wages from Mr. Bray for the pay period ending February 15, 1984. However, at the hearing before the Board, the applicant withdrew its claim in this regard. At the hearing, the applicant requested a declaration that the respondents were in violation of the terms and conditions of the collective agreement, an order that the respondents adhere to the terms and conditions of the said collective agreement, and an order that the respondents compensate Mr. Bray for the allowances as set out in Article 1100 as a result of the respondents' violation of the collective agreement with interest thereon. At the hearing the respondents denied that they had violated the collective agreement.



3. This grievance arises with respect to work performed at the construction project at the Bruce Nuclear Generating Station "B". The following facts were agreed upon by the parties:

- I Mr. Bray was scheduled to work on February 8, 1984, between the hours of 8:00 a.m. and 4:30 p.m.
- II An employees' assembly point is the location designated by a foreman or general foreman as the location where the employee is to be at the beginning and the end of his shift.
- III Mr. Bray had left his assembly point prior to 4:30 p.m. on February 8, 1984, en route to his home but had not yet passed through the security gate.
- IV Mr. Bray did not receive permission from any authorized representative of Ontario Hydro to leave his assembly point prior to 4:30 p.m. on February 8, 1984, nor did he request it.
- V Mr. Bray received a letter dated February 9, 1984, which contained notice of a wage deduction of 0.1 hours (6 minutes).
- VI Mr. Bray was not paid his daily travel allowance of \$11.00 for February 8, 1984.

The letter reads as follows:

Dear Mr. Bray,

You were not at your assembly point at quitting time on February 8, 1984.

You have been deducted .1 hour for that date as notified by your supervisor.

You must remain at your assembly point as designated by your foreman until normal quitting time.

Any further incidents of this nature could result in your suspension for two (2) working days without pay.

"Gord Little"  
Elect. Gen. Foreman  
Bruce G. S. "B"

4. The applicant and the respondents are parties to a collective agreement in effect from May 1, 1982, to April 30, 1984. The collective agreement is stated as being between the Electrical Powers Systems Construction Association (EPSCA) and The IBEW Electrical Power Systems Construction Council of Ontario representing various affiliated local unions. Subsections 1100 and 1101 provide in part:

1100 A. The daily travel allowance will be paid by the Employers to their

employees who are not receiving room and board allowance as referred to in Subsection 1101, on the following basis:

• • •

- (iii) If an employee lives within 40 to 56 radius kilometers of the project, he shall receive \$11.00 per day travel allowance for each day worked or reported for.

1101 A. . .

- (ii)(b) When an employee's regular residence is more than 97 radius kilometers from the Project in the Southern region, the employee shall be paid a subsistence allowance of \$29.00 (\$33.00 effective May 1, 1983) per day for each day worked or reported for.

1101 B. An employee shall not qualify for daily travel allowance or room and board allowance as provided for in Subsection 1100 and Subsection 1101, Item A above, when such employee reports for work but does not remain at work for his scheduled daily hours unless excused by an authorized representative of his Employer. Such permission shall not be unreasonably denied.

5. It was agreed by the parties that the respondents' requirement that employees gather at a designated assembly point at the commencement and at the end of the shift was both reasonable and desirable in terms of the relationship between the parties. For example, it was agreed that on a large project, such as Bruce Nuclear Generating Station "B", this is a method of ascertaining whether an employee is injured and also for ensuring that employees remain on a project for the duration of the shift. Mr. Bray was not at his designated assembly point at quitting time, and in addition to having 0.1 hour's pay (6 minutes) deducted from his pay for the day in question, was also not paid his travel allowance in the amount of eleven dollars. The applicant argued that the deduction of six minutes' pay was sufficient penalty for the admitted failure of Mr. Bray to be where he was assigned to be during the working hours of the shift in question. The applicant viewed the refusal of the respondents to pay the travel allowance as unreasonable and excessive. The applicant pointed out that depending upon where the employee lived, he might either receive no travel allowance or receive as much as thirty-three dollars a day in a subsistence allowance provided for under the collective agreement. The fact that the consequences of not being present at the designated assembly point could lead to such a variety of penalties was viewed by the applicant as being discriminatory. The applicant argued that if at the end of the day Mr. Bray was to be penalized for not being at his designated assembly point, then the doctrine of substantial performance ought to be triggered and that the individual should lose a percentage of rather than the entire amount due to him under subsection 1100 of the collective agreement. The applicant adopted the position that the Board ought to apply practicality in the work place rather than the letter of the law.

6. The respondents argued that the disentitlement to travel allowance was a contractual consequence expressly provided for in the collective agreement. The respondents further argued that the entitlement was not created by merely reporting for work. In the view of the respondents, it was necessary for Mr. Bray to report for work and remain at work before becoming entitled to the travel allowance. In these circumstances, it was the position of the respondents

that subsection 1101B applied to Mr. Bray because he had been caught by the requirement to remain at work for the scheduled hours. The respondents viewed the requirement to be at the designated assembly point as the last assignment of the day. The respondents argued that Mr. Bray's failure to be at the designated assembly point attracted discipline for insubordination in the form of not being entitled to or qualified for the travel allowance. The respondents stressed that the failure to perform the last assignment of the day resulted in Mr. Bray not performing his scheduled daily hours for February 8, 1984.

7. Mr. Bray left the assembly point en route to his home prior to 4:30 p.m., even though he was physically on the property of Ontario Hydro. The designated assembly point is the place where management has instructed its employees to report. The requirement to be at the designated assembly point is a requirement of management and is the last assignment of the day. Ontario Hydro is entitled to expect that the assignment will be obeyed. Where an employee does not obey such an assignment, such conduct normally attracts discipline because it is insubordination. The wording in subsection 1100 is to be contrasted with the wording in subsection 804A, which states:

An employee who reports for work at the beginning of a shift and is unable to commence work due to inclement weather will receive three (3) hours' pay at the applicable rate. To qualify, the employee must remain at a protected place or area as designated by the Employer for three (3) hours unless excused by an authorized representative of his Employer.

In subsection 804A an employee who reports for work and is unable to commence work due to the inclement weather receives three hours' pay at the applicable rate. Subsection 1101 provides that an employee does not qualify for daily travel allowance or room and board allowance as provided for when he reports for work but does not remain at work for his scheduled daily hours unless excused by an authorized representative of his employer. A comparison of these two sections indicates that the parties have addressed the issue of reporting for work on the one hand, which gives rise to certain entitlements in the case of inclement weather, and the act of remaining at work for the whole scheduled daily hours. Similarly, in section 4, work is there used in the context to mean only performing duties to further the completion of the project. It means doing an assignment in furtherance of the project.

8. The Board notes that there is no longer a dispute with regard to the deduction of the 0.1 hours from the pay of Mr. Bray. On the other hand, the dispute remains with respect to the travel allowance. The travel allowance is awarded pursuant to a contractual obligation in the collective agreement. It is not a penalty clause. It is a contractual obligation and is paid to employees who qualify. In our view, the eleven dollars which was not paid to Mr. Bray is in the nature of an entitlement pursuant to a contractual consequence expressly provided for in the collective agreement. The denial of the eleven dollars is not a penalty provision which was taken away from Mr. Bray. The entitlement to the travel allowance is not created under the collective agreement by reporting for work. It is not enough to report for work. The individual is required to report and remain there. Section 1100A(iii) provides eleven dollars per day travel allowance for each day worked or reported for. The normal work day expires at 4:30 p.m. and Mr. Bray was not at work pursuant to a designated order of the management of Ontario Hydro on February 9, 1984. Mr. Bray is caught by the requirement to remain at work for the scheduled hours provided for in the collective agreement.



9. In *Re Patons & Baldwins (Canada) Ltd. and Amalgamated Clothing & Textile Workers Union, Local 836* (1980), 25 L.A.C. (2d) 332, at pages 335 and 336, the board of arbitration stated:

It is well-settled law that the basic rule is that performance of a contractual obligation must be exact subject to the qualification known as *de minimus* rule, that is that minute and unimportant deviations from exact compliance will be ignored. However, under certain circumstances, it has been held that the rigour of the law of an exact performance is in some cases mitigated by the doctrine of substantial performance, whereby a party who has performed his obligation except for matters of a minor character will be allowed to enforce the obligation of the other party. This doctrine which clearly has no application in collective agreements has, however, been applied by analogy by several arbitrators and, in particular, was relied upon in the four cases already specifically mentioned.

Whatever merit there may be in importing the doctrine of substantial performance to contractual obligations which are not entire but rather divisible, it is also reasonably well settled that it is a question of construction in each case whether the parties intended that this doctrine should apply or that there should be complete and exact performance: see 9 Hals., 4th ed., p. 334, para. 475.

In the instant case it seems to us reasonably clear that the parties intended that there should be complete and exact performance of the qualifications which constitute conditions precedent to the right of an employee to be paid the statutory holiday.

In the instant case, the parties have carefully provided in clear wording the requirements which are required in order for an employee to be paid his travel allowance. In *Re Goodyear Tire & Rubber Co. of Canada, Ltd. and United Rubber Workers, Local 232* (1977), 15 L.A.C. (2d) 15, the board of arbitration noted that when the purpose of the qualifying condition is thwarted or circumvented by deliberate deceptive action on the part of a grievor, it cannot be said that there has been substantial compliance with the terms of a collective agreement. In that case the board concluded that the words "at work" were capable of an interpretation which required full attendance at the shift or only reporting for work. The board determined that the grievor had taken deceptive and evasive action and that the employer had acted in accordance with the terms of the collective agreement in denying payment to a grievor for a statutory holiday. In the unreported decision of *The Electrical Power Systems Construction Association and The Ontario Allied Construction Trades Council* (decision dated September 7, 1978), the majority of a board of arbitration found that an employee was entitled to a subsistence allowance "for each day worked or reported for". The board noted that the hours of work for these employees on Friday was stated as one shift of eight hours. The employees did not work their whole shift, but rather worked four hours of that shift and left. In those circumstances, the board held that it could not hold that by working part of the shift it was equivalent to a day worked and that a day must be considered as a full day or a full shift on that day from 7:30 a.m. to 4:00 p.m. The facts indicated that the employees did not have permission to leave and, therefore, since they had not completed their shift they could not qualify under the terms of the article in the collective agreement.

10. In the instant case, parties have provided for the conditions under which an employee is entitled to a travel allowance. The payment of eleven dollars per day is earned by an employee who satisfies the terms of the collective agreement. It is a payment which is earned and when earned is paid. We do not accept the argument of the applicant that the travel allowance by being denied, constitutes a penalty and a penalty which is discriminatorily applied depending upon the entitlement of the employee concerned to subsistence allowance or to travel allowance or to neither of these because of his place of residence. The refusal by Ontario Hydro to pay the travel allowance is not a penalty. It represents a failure by Mr. Bray to earn his entitlement to the travel allowance and is therefore not discriminatory conduct depending upon the individual employee who was involved.

11. The act of Ontario Hydro in denying the travel allowance to Mr. Bray arose from his failure to fulfill the necessary conditions with respect to a contractual obligation between the parties. Ontario Hydro has not violated the collective agreement and this grievance is dismissed.

#### **DECISION OF BOARD MEMBER C.A. BALLENTINE;**

1. I dissent from the decision of the majority in this case.

2. I am of the view that Hydro violated the collective agreement. Section 1100A (iii) of the agreement provides that an employee living within a 40-56 kilometre radius of the project shall receive a \$11.00 per diem travel allowance "for each day worked or reported for." The only relevant modification of this section is found in section 1101B. That section provides that an employee shall not qualify for the travel allowance "when such employee reports for work but does not remain at work for his scheduled daily hours unless excused by an authorized representative of his Employer". In other words, entitlement to the travel allowance is lost only where the employee, without permission, fails to remain at work for his scheduled work day. In my opinion, it has not been established that Mr. Bray failed to remain at work for the scheduled work day. Mr. Bray was present at the Ontario Hydro project for his scheduled daily hours. All that has been established is that he was not present at his assembly point at quitting time on the day in question. He was still physically present on Hydro property, and there is no allegation that he did not complete his day's work. Thus, in concluding that Mr. Bray did "not remain at work for his scheduled daily hours", the majority is reading an added requirement into section 1101B, i.e., that the employee must be physically present at the place designated by management at the appropriate time.

3. Even assuming that Mr. Bray has not technically satisfied the section 1101B travel allowance requirement, it is my opinion that exact compliance with the section should not be demanded in the circumstances of this case. As the board of arbitration said in *Re Patons & Baldwins Ltd.* (cited by the majority, *supra*):

It is well-settled law that the basic rule is that performance of a contractual obligation must be exact subject to the qualification known as *de minimus* rule, that is that minute and unimportant deviations from exact compliance will be ignored.

Mr. Bray was not present at the proper station for a mere 6 minutes of an 8-hour work day. If this is not a case for invoking the *de minimus* rule, then I am hard pressed to imagine one.

4. I do not agree that the cases cited by the majority are of any relevance. In both cases cited, the employees completed only 4 hours of scheduled 8-hour shifts, and thus lost entitlement to contractual benefits. The facts in this case are clearly different. It is at least arguable that Mr. Bray has completed his work day. At worst, he is 6 minutes short of entitlement to the travel allowance. In no way can his failure to remain at the checkpoint be said to be deceptive and evasive action, as the board of arbitration characterized the grievor's conduct in *Re Goodyear Tire*.

5. I cannot leave this case without a parting comment. In my view, Hydro has adhered to its strict contractual rights to the detriment of all parties involved. Both union and management have incurred great expense over what is essentially an \$11.00 grievance, and the Board's resources have been abused in the process. I am not unmindful of Hydro's desire to ensure strict employee compliance with its directives, nevertheless, I remain unconvinced that it was necessary for Hydro to act as it did. Mr. Bray received an official warning and had 6 minutes' pay deducted for his action, which, in my view, is sufficient. I am deeply disturbed by the additional penalty imposed; benefits earned under the collective agreement should not be withheld based on a technical reading of that agreement, in order to penalize an employee. The use of the collective agreement for such improper purposes does nothing to foster harmonious labour relations, and ought not be sanctioned by the Board.

6. The grievance should succeed, and Hydro should pay Mr. Bray \$11.00 with interest from February 8.

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**0965-84-U(D); 0965-84-U(E) Ontario Public Service Employees Union, Applicant, v. Oshawa General Hospital, York-Finch General Hospital, Respondents**

**Change in Working Conditions — Hospital Labour Disputes Arbitration Act — Unfair Labour Practice — Hospitals raising employee parking rates during freeze period — Whether business as usual or breach of Act**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. Armstrong.

**APPEARANCES:** Paul Cavalluzzo, George Mitchell, Pat Rout and Anne Marie Hesper for the applicant; Allan Shakes and R. E. Duchemin for Oshawa General Hospital; Allan Shakes and Margaret E. McClelland for York-Finch General Hospital.

**DECISION OF THE BOARD;** January 25, 1985

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent hospitals violated section 13 of the *Hospital Labour Disputes Arbitration Act* when they raised their fees for employee parking during the statutory "freeze" period. Section 13 provides:

Notwithstanding subsection 79(1) of the *Labour Relations Act*, where



notice has been given under section 14 or 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

2. Both of these hospitals are participants in “joint bargaining” now underway for the renewal of their respective collective agreements, which expired December 31, 1983. The outstanding issues are on their way to arbitration, and included in those issues is a union demand for free parking for all employees. During the course of 1984, a number of hospitals either introduced parking fees for their employees for the first time or announced increases to existing rates, and unfair labour practice complaints similar to the present were filed by the union (in the case of the instant two hospitals, over the express written objection of the Local Presidents). Some of these complaints have been withdrawn, some have been settled, and some have resulted in decisions by the Board. Only the complaints against Oshawa General Hospital and York-Finch General Hospital, the instant respondents, remain outstanding.

3. Section 13 of the *Hospital Labour Disputes Arbitration Act* is in much the same language as section 79 of the *Labour Relations Act*. The Board in *Spar Aerospace Products*, [1978] OLRB Rep. Sept. 859, made some observations on its approach to interpreting the “freeze” language of section 79, and those comments, articulating a standard of “business as before”, have served as a guide to applying the section ever since. At paragraph 23, the Board wrote:

The “business as before” approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

4. In *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679, the employer hospital had for a period of ten years granted to its employees the privilege of free parking, and then served notice of its intent to commence charging a fee after the onset of a “statutory freeze” period. The Board, in finding that the employer’s action violated the Act, wrote:

In other words, the Board has found that in order to protect the purpose of section 70, a party who wishes to revoke a privilege which may reasonably be expected to continue or re-assert a right which has been consistently waived must do so or communicate its intention to do so prior to the commencement of the freeze period so that minimal disruptions to the employment relationship will arise to interfere with the ongoing negotiations.

In the instant case the privilege of free parking which the employer had extended to the employees for more than a decade and which the employees had every reason to anticipate would continue in the future was unilaterally revoked during the freeze period without the consent of the trade union.

5. In the case of *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764, the Board found that employees had historically been permitted to use the hospital's parking lots on the basis that they paid the same *per diem* rate charged to the public. When the charge to the public had increased over the years, a corresponding change in the rate for employees (who received weekly or monthly passes) was made as well. Assuming that this parking arrangement over the years amounted to a "privilege", the Board went on to a note, at paragraphs 7 and 8 that:

... there is the further question of "What is the privilege?". It is a privilege of using available parking space at the daily rate of 50 which was in effect when the freeze period started, as the complainant submits? Or is the privilege (although the respondent denies there is in fact a privilege) one of using parking space under terms and conditions which apply equally to employees and the public as the respondent submits?

On the evidence, the Board finds that the terms and conditions under which the employees who may be affected by this complaint have use of the respondent's parking facilities include use of the available space at the same rate as is charged to the public; i.e., a "going rate" and not at a *per diem* rate of 50.

In the result, the complaint was dismissed.

6. As noted, the present complaint initially involved a number of hospitals who implemented changes to employee-parking arrangements after the onset of the statutory "freeze", and the complaint with respect to two of those hospitals has already been the subject matter of a Board decision. *St. Joseph's Hospital*, File No. 0965-84-U(A), released September 25, 1984, was a case similar to *Scarborough Centenary Hospital*, *supra*, where, at least with respect to the particular lot in question, no charge for employee use had ever before been levied, and once again the Board found a violation of the "freeze". On the other hand, *Ottawa General Hospital*, being File No. 0965-84-U(B), released the same day, involved an adjustment to an existing scheme of paid parking, and the Board found no violation of the *Hospital Labour Disputes Arbitration Act* to have occurred. In all of these cases under the "freeze" section, it should be noted, the presence of anti-union *animus* need not be shown. Nor, on the other hand, need the employer make out a case of justification for the position it has adopted: the proper forum for that issue is the board of interest-arbitration, whose task it is to determine the ultimate terms and conditions of the parties' collective agreement. Whatever those terms

and conditions may ultimately be, the only question before *this* Board, under the provisions of section 13 of the *Hospital Labour Disputes Arbitration Act*, is whether the employer has effected a “change” in the “rates of wages or any other term or condition of employment, or any right, privilege or duty” of the employees while the parties continue to be in the process of re-negotiating their collective agreement. And in assessing that question, it should be noted as well that the “freeze” applies to *all* conditions of employment, privileges, et cetera. The fact that a particular condition with respect to which an employer has allegedly implemented a “change” is also the subject matter of ongoing negotiations neither causes the section to apply, nor prevents it from doing so, as the two cases decided previously under this complaint amply demonstrate.

7. With respect to the first case before us now, Oshawa General Hospital, the hospital has had two areas available for both staff and public parking, a lot and a garage, since 1973. The monthly rate for employees for the garage, at least, was \$6.00 at that time. Increases in the rate charged to employees since then have been as follows:

1976

LOT	50 day \$9.00
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GARAGE	\$10.00
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1980

LOT	75 day \$13.00 month
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GARAGE	\$15.00 month \$180.00 year
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1981

LOT	\$1.00 day \$15.00 month
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GARAGE	\$1.00 day \$17.00 month
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1984

LOT	\$1.00 day \$18.00 month
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GARAGE	\$1.00 day \$18.00 month
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The 1976 increase came as a result of a survey taken of parking rates being charged generally in the Oshawa area. In 1980 and 1981, additional increases were again put into effect on the basis of surveys done. Through these years increases to the maximum daily rate charged the public increased at the same time. Surveys in late 1982 as well as in 1983 again showed that an increase was justified, but at that time, construction on the garage plus a shortage of parking space had created considerable irritation for staff and the public alike, and the Hospital did not consider it appropriate to add to problem with the announcement of a further adjustment. The 1984 survey of area rates, filed with the Board, once again showed the Hospital's rates lagging well behind, and that, plus increases in the wages paid to attendants and the rental fee of the City for the lot, as well as the finance costs for expansion of the garage, led the Hospital to announce the additional rate increase shown above and to equalize the rate payable for both the garage and the lot. The daily rates for visitors were left as they were, as the percentage increase implemented for the staff would have rendered the making of change at the gate more difficult, but the length of the "grace" period was altered, and a deposit required for the evenings. All of these changes were announced in July, effective September 1, 1984. The complainant had, however, given notice to bargain on October 19, 1983, and has taken the position since word of the increases became public that the Hospital was in violation of the "freeze" provision of the *Hospital Labour Disputes Arbitration Act*.

8. At York-Finch General, notice to bargain was also given on October 19, 1983, and the rate charged employees for parking was increased in May of 1984, from \$7.50 to \$8.00 a month. That, once again, was over the written objection of the Local President, who testified that she thought the rate charged employees for parking had been at \$7.50 for approximately two years. In fact the evidence discloses that her recollection is inaccurate, and that the rate has increased annually in each of the past 3 years. The summary of rate increases since changes began shows:

1976	\$5.00
1977	\$5.00
1978	\$5.50
1979	\$5.50
1980	\$6.00
1981	\$6.00
1982	\$7.00
1983	\$7.50
1984	\$8.00

The Hospital's Director of Personnel, while relatively new at the Hospital and not one of the individuals asked for input into the decision to implement an increase, testified that surveys of hospital parking rates in the region are conducted annually, and an increase implemented as soon as that is completed, unless the increase would be so small as to merit waiting for the

next year's survey. Increases have also been made from time to time to the parking rates charged medical staff and visitors, although not necessarily in synchronization with the support staff's.

9. The applicant contends that the "privilege" frozen by the Act as of the date the collective agreement expired was the privilege to park at the rate in effect at each Hospital on that date. The respondent, on the other hand, contends that the privilege is that of being permitted to use the Hospital's lot at a rate which is subject to periodic review and adjustment. Similar positions were taken in the complaint filed against the Ottawa General, referred to above, and the Board wrote:

7. As in the *Humber Memorial* case we view it necessary to define the nature of the instant employee privilege in respect to use of parking facilities which existed at the time the freeze period set in. The complainant would define the privilege as that of the use of parking facilities at a rate of \$9.69 per bi-weekly pay period: the respondent on the other hand would define the privilege as one to use parking facilities at such rate as may be determined by the Hospital from time to time and points to a long standing history of rate adjustments to demonstrate that it was conducting "business as before".

10. In *Ottawa General*, the Board found a well-established pattern of reviewing parking rates annually, and effecting adjustments if and when circumstances justified it. There was not, in that case, even the consecutive years of annual increases demonstrated from 1982 to 1984 at York-Finch. The Board nevertheless wrote, at paragraph 8:

On the evidence it must be concluded that employees were well aware that the parking privilege was not one at a fixed rate but one subject to adjustment. The rate was in fact adjusted as of April 1st, 1984. The most recent adjustment cites increased cost to the hospital of the cost of parking space, and the passing on of costs to employees was limited by the Hospital. We are satisfied that in increasing employee parking rates as of April 1st, 1984 the respondent was managing its operation after the onset of the freeze in the same pattern as it had done before such onset and, accordingly cannot be said to have acted in contravention of section 79 of the Act.

11. The periodic review of rates and adjustment where justified, in other words, was found to be "business as before". It appears to us that this practice also constitutes "business as before" at the two instant hospitals, and that employees at these two hospitals would have been equally aware that the rate they were charged for parking had been and would continue to be subject to periodic surveys and adjustment. At York-Finch, the increases had even been consecutive in the years 1982 and 1983, and at Oshawa General had taken place in both 1980 and 1981, before being left in abeyance during what was largely a period of disruption and expansion of the parking space. The prospect, or even likelihood, of continued escalation of parking fees, on these facts, could hardly be said to lie outside the reasonable contemplation of employees at either hospital. The demand for free parking at the central bargaining table is clearly aimed at the Hospitals' overall policy of charging employees for parking, whatever the rate.

12. In response to the Union's argument, the Board does find a difference, in terms of employee anticipation, between the sudden introduction of parking charges for the first time, and the implementation of one more in a series of adjustments, instituted from time to time, to an already existing practice of charging. The Board also declines on policy grounds to

over-rule, as urged, the decisions of the Board in *Humber Memorial* and *Ottawa General*, *supra*. The question of what constitutes "business as usual" in these types of cases is not so patently clear as to make it a service to the community to have the Labour Board knowingly render contradictory decisions.

13. Finally, we agree with Mr. Cavalluzzo for the complainant that the first-hand knowledge of the management individual who testified for York-Finch was not what it might be. Having regard to the fact, however, that the amount of the 1984 increase falls clearly within the pattern established in prior years, the Board, in the circumstances, finds the evidence which she did provide concerning that year's increase sufficient to satisfy us that the employer was in fact on this occasion conducting "business as usual".

14. The complaint with respect to both Hospitals is accordingly dismissed.

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**0960-83-U Cameron Douglas Wonch, Complainant, v. Rapid Ready Mix Limited, Respondent**

**Practice and Procedure — Reconsideration — Unfair Labour Practice — Unsuccessful complainant seeking new hearing to present further evidence — Board reviewing its role as a quasi-judicial tribunal — Examining its power to reconsider decisions — Request for new hearing denied**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and J. Wilson.

**DECISION OF THE BOARD;** January 10, 1985

1. In a decision of the Board dated September 20, 1983, the Board unanimously dismissed the complainant's unfair labour practice charges against the respondent company. By letter dated October 9, 1984, the complainant submits that there should be a new hearing, so that he can put further evidence before the Board. In order to properly assess this request, it may be useful to sketch in some of the background of this case and to comment briefly upon the nature of proceedings before the Board.

2. The complainant, Cameron Wonch, was an employee of Rapid Ready Mix Limited ("the company") which runs a ready mix concrete business in the Sault Ste. Marie area. On or about December 16, 1981, Mr. Wonch ceased to work for the company. His employment was terminated without any specified or anticipated date of recall.

3. The complainant was not rehired in the spring of 1982 at the beginning of the 1982 construction season. He was not rehired at the beginning of the 1983 construction season. Nor did he seek to return. In the eighteen-month period between December, 1981 and June, 1983, the complainant made no effort to contact the company to request employment. Indeed, in a casual meeting with a foreman in October, 1982, he mentioned that he was working elsewhere



and was making higher wages than the company had been prepared to pay. He expressed no interest in returning to work.

4. As we have already noted, after leaving the company in December, 1981, the complainant's first contact with the company occurred in June of 1983. Under the collective agreement then in place he had no seniority-based right to recall or right to displace any existing employee. He filed this unfair labour practice complaint on July 30, 1983. The complaint contends that the failure to recall him was tainted by anti-union considerations. Mr. Wonch asserts that he was not rehired because he was a trade union supporter. Although the complaint, on its face, focuses on 1983, the allegations before the Board were extended back to 1982. The company denied those allegations.

5. A hearing in this matter was held in Sault Ste. Marie on September 7, 1983. The company retained counsel to defend against the complainant's allegations. Mr. Wonch appeared without counsel, and as the Board observed in its initial decision, this may have been unwise. A party who chooses to proceed without counsel may be taking a tactical risk. While the Board's proceedings are relatively informal, any person alleging illegal conduct should understand the legal foundation for his charges, and may be called upon to support them with evidence. If such evidence is not led, because of inadequate investigation, unfamiliarity with the law, a failure to appreciate what is relevant, or otherwise, the complaint may be dismissed. And so it should be. It is relatively easy to make allegations. It may be much more difficult to sustain them. Yet the mere allegation may require a time-consuming and costly hearing. The Board (unlike a court) does not require a losing party to pay the costs of the winner, however, this does not mean that a Board proceeding is without cost to the parties or to the public. Litigation is expensive. It should not lightly be contemplated, prolonged or repeated.

6. The Labour Relations Board is an independent quasi-judicial tribunal, exercising powers and responsibilities prescribed in the *Labour Relations Act*, and the *Statutory Powers Procedures Act*. Unlike some agencies of government, the Board does not perform a licensing function or regulate the flow of government benefits to public claimants. It does not investigate citizen complaints or dispense advice. The Board's primary function is adjudication: the determination of the rights of employers, employees, and trade unions, under the *Labour Relations Act*. In this respect the Board operates rather like a court; and, in fact, its origins can be traced to the Ontario Labour Court, which was first established in 1943.

7. Like a court, the Board does not make a determination based only upon one party's version of the facts, nor does it merely compare the factual assertions made in the parties' pleadings, then issue a decision. It would be quite wrong to do so. (See section 102(13) of the *Labour Relations Act*.) Instead, the Board conducts a public hearing to entertain the evidence and representations of all parties with a legal interest in the proceeding. Typically, the Board will sit as a panel of three composed of a vice-chairman and nominees reflecting employer and employee interests. If there are assertions concerning the propriety of an individual's conduct, his good character, or his competence, he is entitled to notice of the proceeding and an opportunity to participate. He has a right to attend the hearing in order to meet and perhaps refute the allegations made against him. It would be contrary to the statute and the rules of natural justice to proceed in any other way.

8. The evidence before the Board is given under oath and is subject to the test of cross-examination and rebuttal by the parties' adverse in interest. The Board makes a determination of the facts based upon the weight of the testimony presented, including an assessment

of the credibility of the various witnesses. At the end of the case the significance of the evidence is weighed in accordance with the established legal and statutory parameters after the parties have had an opportunity to make their submissions. The Board then issues a written decision setting out its findings of fact, its legal conclusions, and the reasons therefor. Again, it will be seen that the Board's procedures are closer to a judicial model than those of many other agencies or arms of government. If it is alleged that the Board has erred in law and exceeded its jurisdiction or has denied natural justice, that issue can be canvassed on an application for judicial review to the Divisional Court of the Supreme Court of Ontario.

9. It is this general approach which the Board followed in the instant case. The complainant alleged that his former employer had acted illegally. The Board scheduled a hearing. By virtue of the "reverse onus" provisions of section 89(5) of the *Labour Relations Act*, the respondent company was obligated to affirmatively demonstrate that its conduct did *not* constitute a breach of the Act. In other words, the Act provides that if there is an assertion of discrimination in employment, the employer must come forward with an explanation for its actions which is both credible and entirely free of anti-union considerations. In practice, this means that a respondent employer must proceed first and give *bona fide* reasons for the impugned conduct.

10. Few employers welcome the prospect of dealing with a trade union. In this rather general sense, many employers may have, or express anti-union sentiments. However, in a case under section 64, 66 or 71 of the Act, what is important is whether the particular employer action in question (discharge, discipline, transfer, layoff, etc.) was motivated by the fact that the complaining employee was a trade union supporter or was exercising rights under the Act. It is not enough for an aggrieved employee to assert that this is so. If the employer denies it and tenders a reasonable explanation which is plausible and unshaken by cross-examination, the onus may well shift back to the employee to show that the employer's explanation should not be accepted. The issue is the employer's "real intention" and this, in turn, may well turn upon an assessment of the employer's credibility, and whether its actions are consistent with the existing business circumstances. Again, these judgments are made only after a hearing where the members of the Board have had the opportunity to directly observe the demeanour of the various witnesses and weigh the completeness, clarity, consistency, and credibility of their testimony.

11. In the instant case, the employer proceeded first, calling as its witnesses, Gerald Hill, the owner, and Kenneth Trudeau, a foreman. The complainant called George Palanuk, a trade union representative, Randy Haskett, an employee (or former employee) and gave evidence himself. In reply, the employer called Carlo Barban, a local construction contractor with whom the company had had dealings in 1981 and 1982. Barban's evidence supported Hill's testimony about the low level of business activity in the spring of 1982 — an assertion which the complainant had questioned.

12. This evidence (*inter alia*) is summarized in the Board's decision of September 20, 1983, and need not be repeated here. It suffices to say that the company explained that its failure to rehire the complainant was related to adverse business circumstances in the spring of 1982, its inability to contact the complainant, and the complainant's apparent lack of interest as evidenced by his own failure to contact the company in the eighteen-month period immediately following his termination by which time any seniority rights he might have had under the collective agreement had been extinguished. The company also pointed out that other trade union supporters had in fact been recalled — albeit, sometimes for short periods. Hill's

testimony was forthright and plausible — in marked contrast to that of the complainant, whose recollection was fuzzy, and whose evidence frequently dealt with matters quite irrelevant to the issues in this case. Having heard this evidence, as well as that of the complainant's witnesses, the Board unanimously concluded:

On the basis of the totality of the evidence before us, we are not satisfied that the complainant has been discriminated against or dealt with improperly because of his membership in a trade union, we are not satisfied that the respondent has attempted to circumvent its employees' bargaining agent and bargain directly with them, and we are not satisfied that during the so-called statutory freeze established by section 79 of the Act, it did anything other than carry on "business as usual" — albeit in somewhat unusual and difficult economic conditions. We find that the evidence does not support any of the complainant's allegations and that, therefore, this complaint must be dismissed.

Copies of the September 20, 1983 decision were mailed to the parties on or about September 22, 1983.

13. The request for a rehearing is dated October 9, 1984, and the complainant refers to and relies upon several affidavits sworn by the deponents between September 12, 1983, and September 25, 1983 — that is, in the two-week period immediately following the hearing but before the complainant would have received the Board's decision dismissing his complaint. These affidavits relate to events in 1982 or 1981, and either purport to contradict certain details of the evidence given by witnesses at the hearing, or contain entirely new assertions of fact from which one *might* draw an adverse inference of anti-union animus. We say "might" because the causal connection with the failure to rehire the complainant is not a necessary one, and because these submissions, even if true, do not necessarily undermine the evidence of the witnesses called by the employer concerning its action (or more accurately inaction) vis-a-vis the complainant. In response to these new assertions raised by the complainant, the company again retained counsel and submitted a detailed response explaining why, once again, the complainant's contentions are unfounded, misconceived, or fail to appreciate precisely what happened. The employer also resisted the reopening of a case which was dismissed more than a year ago.

14. We are troubled by this belated submission of supposedly "new evidence" — not least because some of it is rank hearsay and there appears to be no reason why, with reasonable diligence, it could not have been put before the Board at the time of the first hearing. For example, Mrs. Haskett asserts that her husband told her that it was his *opinion* that he was not recalled in 1982 because of his support for the union. But Mr. Haskett's "opinion" supposedly expressed to his wife has little probative value. It is also interesting to note that the complainant called Mr. Haskett *as one of his own witnesses* — a witness whose credibility, it appears, he now seeks to impeach. If we did choose to disbelieve Haskett, it would not further the complainant's case one bit, nor would it in any way call into question Hill's testimony that there was no real need to rehire the complainant in 1982, and by 1983, he really didn't consider it. It simply does not matter that Haskett, recalling his work pattern a year previously, may have been in error concerning precisely how little he worked; nor does it matter that a driver may have delivered one load (or ten) in the spring-summer of 1982. At the hearing, the evidence demonstrated that: business was slow, there was no need to recall the complainant, and the complainant never sought such recall — even though, he said he was aware of at least some



construction activity. Against the evidence of Hill, who was directly involved in the business at the time, there was that of the complainant who was working elsewhere, and whose evidence at its highest, was vague, impressionistic, and not even terribly consistent when subjected to cross-examination. Even assuming that these new statements were put in evidence before the Board at the original hearing (where they would, of course, have been subject to cross-examination, as they now are not), we do not think that they would have altered the result. The same can be said of the other statements relating to alleged employer statements or conduct long before the company's supposedly improper treatment of the complainant, not directly connected to that decision, and, of course, never previously raised with the respondent. Gerald Hill was questioned, in a general way, about what had happened at the initial certification hearing and whether two employees from the Sowerbee location had attended. But the particular allegations in the request for a new hearing were not put to him — as in fairness they should have been, so that he could respond at the time. Nor did the complainant seek to call evidence to rebut or amplify what Hill had to say. If the complainant was able to collect this supposedly “new” evidence within days of the hearing, why did he not do so beforehand? Why should the respondent be required to attend a new hearing to explain matters which could have been raised in the hearing conducted more than a year ago?

15. Section 106 of the *Labour Relations Act* reads as follows:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

It is clear that a Board decision is intended to be final and binding. It is equally clear that the Board is empowered to reconsider any of its decisions, and that such reconsideration could include granting a new hearing to entertain further evidence or directing a “trial *de novo*”. However, reconsideration should only be granted in exceptional circumstances. If it were otherwise, the first hearing before the Board would be but a “discovery” for some later proceeding.

16. A losing party will not be granted a new hearing simply because it has lost, or because it has put its case badly or has failed to adduce potentially relevant evidence. A party is expected to come prepared to deal with the issues raised, and to have done its investigation and preparation *prior* to the hearing. If motive is an issue — as it is in most unfair labour practice cases — a complaining employee should be in a position to put before the Board the evidence from which it might infer anti-union animus.

17. Section 106 is not intended to allow a losing party to correct its mistakes or shore up an inadequate case. To put the matter colloquially: “a party gets only one bite at the apple”. The Board will not normally set aside a decision and schedule a new hearing to hear further evidence unless it is persuaded that the “new evidence” could not have been obtained by reasonable diligence prior to the first hearing, and that the new evidence is likely to be determinative of the matters in dispute. Even then, the Board might have to take into account the costs thrown away by the parties in the first hearing (which they expected to result in a final decision) and the potential impact of any remedial order, which a complainant might seek.

In the instant case, for example, any new hearing would necessarily take place more than a year after the decision dismissing the complainant's charges, and would once again entail an examination of events dating back to 1981. The employer would be required to appear once again to refute factual assertions which could have easily been raised the first time. Since the complainant is seeking reinstatement, a new hearing would also raise, once again, the spectre of displacing one of the company's existing employees — even though under the collective agreement the complainant has no right to recall. And, as we have already noted, between December, 1981 and June, 1983, the complainant never bothered to approach the company to request re-employment. Nor did he raise any unfair labour practice allegations until more than a year after the allegedly illegal failure to recall him in the spring of 1982. Indeed, it is difficult to resist the conclusion that the complainant's concern about returning to work for the respondent company only crystallized some weeks or months after he lost his better paying job with C. A. Pitts Limited. The fact is, that the supposedly unlawful failure to recall Mr. Wonch in the spring of 1982 did not materialize into a concrete complaint until July, 1983.

18. The *Labour Relations Act* contemplates an expeditious resolution of unfair labour practice complaints. The Act requires a hearing. A hearing was held. The Act contemplates that both parties will come to the hearing prepared to present their case, with the knowledge that evidence will be given under oath and subjected to the test of cross-examination. That is what happened here. The Board heard the respondent's evidence and the evidence which the complainant chose to call. Having weighed the evidence presented, the Board accepted the respondent's explanation, found that the failure to recall the complainant was not motivated by anti-union considerations, and dismissed the complaint.

19. The complainant now requests the Board to reconsider its decision and schedule a new hearing so that he can present further evidence. We decline to do so. While section 106 permits the Board to reconsider any of its decisions, it is an extraordinary power which should not be exercised lightly. If it were otherwise, the twin goals of expedition and finality would be seriously undermined. This is especially so in a case such as this, where a party is seeking a new hearing to lead further evidence which, in our view, could with reasonable diligence have been available at the first hearing. Since the complainant was alleging anti-union animus, he could and should have put before the Board all evidence from which the Board might draw that inference in the employer's dealings with him. It is too late to do so now. If the circumstances of this case were sufficient to warrant a new hearing, it is difficult to conceive of any unfair labour practice case which could ever be resolved by one hearing. There are few cases which, with the benefit of hindsight, could not have been presented a little better and even fewer cases where the evidence is as complete as one party or the other would like it to be. But this does not mean that the hearing should be treated as something of a "trial run" for some later proceeding in which one can correct earlier evidentiary inadequacies.

20. We might add that the same considerations would apply to the company if it sought reconsideration on the same grounds as Mr. Wonch. Suppose, for example, that the company had closed its case, without calling the evidence of Mr. Barban, the general contractor. Mr. Barban was a credible and disinterested witness whose evidence contradicted the complainant's assertions about the level of construction activity in the spring of 1982. The Board accepted his testimony. If he had not been called, and the Board had held that the respondent had not met the onus cast upon it by section 89(5), could the respondent later request a new hearing to put in this "new" evidence? We do not think so; and for the same reasons as are outlined above.

21. Certain passages in the request for reconsideration touch upon the conduct of the hearing. It is said, for example, that the Board allowed the employer to file its reply late, beyond the period prescribed by the Rules. But the Rules clearly provide that the respondent shall file his reply, *if any*, within the designated time frame. An employer accused of an unfair labour practice is not *required* to file a reply at all, and this in no way precludes it from coming forward to satisfy the onus cast upon it by section 89(5) of the Act. The statute clearly provides that all parties are to be given the opportunity to present evidence and make submissions [see section 102(13)]. A late reply does not prevent an accused party from making full answer and defence to the accusations against it.

22. The representations concerning the respondent's financial statements pose particular difficulties because, more than a year after the hearing, it is hard to recall or reconstruct the interchange with the respondent's counsel to which Mrs. Wonch refers, or to put it in proper context. As noted, the hearing was conducted on September 7, 1983, and the request for reconsideration was made on October 9, 1984. What is clear is that Gerald Hill, the respondent's owner, gave evidence. He was the first witness called. He did not introduce or refer to the company's financial statements. In cross-examination he was asked many things. He was not asked about the company's financial statements or financial position. He was not asked to produce those documents even though it appears that the complainant was supplied with a subpoena which, if properly served on Mr. Hill, would have required such production. Nor did the complainant seek to put these records in evidence as part of his own case, either through recalling Mr. Hill as the complainant's own witness, or otherwise. In reply, the respondent called only Mr. Barban, who would have no direct knowledge of the respondent's financial situation, and through whom its financial statements could not be introduced. The Board's best recollection (which after a year is far from firm) is that counsel's gratuitous offer to show Mr. Wonch the company's financial statements occurred during the course of argument, after the parties had closed their case. At that point, of course, it would have been quite inappropriate to receive further evidence — particularly where, as here, it was probably favourable to the company position and, in any case, should have been put in as part of the company's case or while Mr. Hill was on the witness stand. If there has been a denial of natural justice the complainant has his remedies in another forum. We do not think these submissions warrant a new hearing.

23. There appears to be some misapprehension on the complainant's part concerning the Board's role in the litigation process. That misapprehension should, perhaps, be addressed.

24. As we have already noted, in its adjudicative role the Board acts rather like a court. It hears the evidence and representations which the parties wish to present, ruling, as required, on matters of relevance, admissibility, and so on. The Board leaves it to the parties to present their cases as best they can. The Board itself does not enter into the arena to advise one party or the other about how to conduct the case — what evidence to call, what questions to ask, what objections to make, whether to seek an adjournment, and so on. Of course, where one or both of the parties is unrepresented, the Board may occasionally be called upon to explain why "hearsay" may be given little weight, or why a particular line of inquiry is not relevant to the issue, or the meaning of privilege, or the problem with "leading questions". But the Board cannot, and must not, step in to "help out" a party who may not be putting his case very well, or through ignorance or inadvertence may have missed some tactical opportunity. To do that, would be to call into question the Board's impartiality.

25. For the foregoing reasons, the Board declines to reconsider its decision of September 20, 1983, or direct a new hearing for the purpose of receiving further evidence. The request



for reconsideration is dismissed.

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**1461-84-R** Retail, Wholesale and Department Store Union, Applicant, v. Sears Canada Inc., Respondent, v. Group of Employees, Objectors

**Bargaining Unit — Employer operating warehouse/service centre and retail store from same location in past — Moving warehouse/service centre location 4 km. away — Whether appropriate unit including both locations — Office employees excluded from service unit**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members A. Grant and B. L. Armstrong.

**APPEARANCES:** *Hugh Buchanan and Frank Reilly for the applicant; L. G. Riggs, Nancy Eber, Loretta T. Ubell, D. G. Gordanier and C. M. Bates for the respondent; Peter Milliken for the objectors.*

**DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** January 17, 1985

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The disagreement between the applicant and respondent as to the bargaining unit description was considerable. Firstly, the applicant sought certification in respect of a bargaining unit restricted to the "warehouse" or "service centre", i.e., the facility located on Railway Street. The respondent asserted the appropriate bargaining unit included both the Railway Street facility and the retail store, located on Princess Street (but did not include the transfer terminal on Dalton Street). The second area of disagreement related to the office and clerical staff: the applicant sought exclusion of this group while the respondent sought their inclusion. Specifically, the applicant desired the exclusion of the customer convenience centre and the merchandise control office as "office and clerical" while the respondent sought the inclusion of these classifications.
4. There were some areas of agreement. The applicant and respondent agreed that there should be separate bargaining units for full-time and part-time employees (and including students employed during the school vacation period in the part-time unit). Further, it was agreed that persons associated with the portrait studio, key shop and Allstate Insurance are not employees of the respondent and are not included in the bargaining unit. Finally, the parties agreed on a number of other exclusions, namely, assistant sales managers, supervisors, persons above the rank of assistant sales manager and supervisor, security staff, personnel department staff and management trainees.
5. The parties recognized that the dispute over the bargaining unit description had implications so significant for the schedules of employees filed by the respondent that this issue

must be resolved before proceeding further with the application for certification. Accordingly, the Board heard evidence on these matters, including one witness for the respondent, Donald Gordanier (operating superintendent) and two witnesses for the applicant, Joseph Dubeau (service technician) and Gerald Van Wyngaarden (service technician). For the purpose of clarity, the warehouse service centre is referred to throughout as "Railway", the retail store is "Princess" and the transfer terminal as "Dalton". The Board notes that counsel for the employee objectors chose not to participate in the proceedings with respect to the bargaining unit description but reserved the right to call evidence relating to other aspects of the application for certification.

6. The Board heard the testimony of the witnesses and assessed their relative credibility according to the usual factors such as the firmness of their memory, the consistency of their evidence, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanour while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered. Based on those assessments, the Board makes the following findings of fact.

7. Before 1976, the respondent housed both its retail store and warehouse/service centre at the Princess Street location. In 1976, however, the respondent required additional space for its retail operation and the warehouse/service centre was moved to the Railway Street location, some 4 km. away. Not surprisingly, employees were transferred to Railway to continue to perform their duties at the new location. Some of these employees still work at Railway.

8. A number of functions are performed at Princess. Since Princess is the retail operation, sales is the primary function. Princess is a full-line department store. The "display" function, i.e., the setting up and maintenance of display fixtures on the floor is obviously integrally related to sales. Employees in "display" utilize the service centre to prepare the display fixtures. Maintenance is responsible for the overall appearance and upkeep of Princess and Railway. The merchandise control office, customer convenience centre and accounting, all at Princess, are discussed separately *infra*. The switchboard department is at Princess and handles both Railway and Princess locations. The personnel department is located at Princess. This department performs the usual personnel functions, e.g., wage surveys, administration of wages, policies and benefits, maintenance of employee records, career counselling and advice, selection, placement and termination of employees. As is logically necessary in order to get goods into and out of the store and to have at least some product immediately on hand to replace stock as sold, there are receiving, shipping and warehousing functions at Princess. "Marking", particularly involving price changes, is performed at Princess. Shipping can be to the service centre, catalogue stores or customers' homes. However, only about 10% of product is shipped directly to customers' homes, 90% is shipped via the service centre. The various merchandise departments are located on both the first and second floors. The catalogue sales office is located on the second floor across the floor from the merchandise control office and customer service centre.

9. A number of functions are also carried out at Railway. "Receiving" involves the receipt of goods of all types from the manufacturer, company-owned inventories and those returned by customers. "Delivery" involves shipping goods to Princess, customers' homes and outlying catalogue sales offices. Railway "services" company products regardless of where the product was purchased. Customers can arrange for service calls by technicians by telephone or in person or the product may be brought in for repair by the customer or picked up from

the customer's home by a company truck. Payment for service, where applicable, is made directly to Railway. Parts for repair of merchandise are sold at Railway (and ordered from the Toronto location if necessary) but may be picked up, at customer request, at Princess. At Railway, employees refinish furniture and, as noted earlier, work on the display fixtures for Princess. Railway "warehouses" all types of product for shipment to Princess or directly to customers' homes. During the "bicycle season", an employee repairs bikes at Railway but will also do so at Princess if the customer is there. Marking of goods is performed at Railway. The Railway facility is referred to as both the "warehouse" and the "service centre". Service technicians may occasionally repair goods at Princess if the customer has brought the product there but those employees are not located at the retail store. While customers can "purchase" parts at Railway, customers must do so at a counter staffed by two or three employees. That is, direct access to the product is not permitted.

10. The managerial hierarchy at Princess and Railway is as follows. The store manager is responsible for both locations. The operating superintendent, controller and personnel manager report to the store manager and are also responsible for both locations. Reporting to the operating superintendent are the service centre manager, display manager, maintenance manager and security manager. The latter three managers plus the sales manager and training manager also have responsibility for both locations. The operating superintendent spends about 10-20% of his time physically at Railway. The service centre manager is in charge of all operations at Railway; the receiving manager, delivery supervisor, service supervisor and parts supervisor all report to the service centre manager and themselves are responsible for the employees in their own areas. The service centre manager retains formal control over the maintenance agreement sales staff (after that department was transferred to Princess); i.e., those employees report to the service centre manager but *through* the operating superintendent.

11. Employees at Railway and Princess have the same benefits and probationary period. For example, there is an established policy regarding time off. The personnel department formally approves time off although the employee would communicate with the immediate supervisor. The supervisor, knowing the policy, would inform the employee immediately if the reason fell within the approved categories but would check with personnel first in unusual cases. There is one type of performance appraisal and the disciplinary process does not differ. There is one classification system with a number of classifications common to both locations. There is one safety committee and social club for both locations. Staff conferences and management meetings are held at various levels and may include appropriate employees from both locations. In 1983, when the company implemented a lay-off, a single seniority list was utilized. A list of employees transferred between locations since 1976 was tendered as an exhibit.

12. There are some differences, as well. For example, at Princess, there are three types of wage structure, i.e., straight commission with a draw, salary plus commission and hourly rated employees. At Railway, all employees are hourly-rated. The working hours at Princess are 9:30 a.m. to 9:30 p.m., Monday to Friday, and 9:30 a.m. to 6:00 p.m. Saturday. At Railway, employees work 8:30 a.m. to 4:30 p.m., Monday through Saturday. When employees fall ill, they are instructed to call the personnel department although the employees at Railway also contact that facility. In at least two instances (Dubeau and Van Wyngaarden), employees at Railway were interviewed and hired at that location by managerial staff responsible for Railway; several days after having commenced work these employees attended at the personnel office at Princess to complete the appropriate forms.



13. On cross-examination of Gordanier and on reply, further details emerged with respect to the interchange of employees between Princess and Railway, specifically the list introduced in evidence. A. Patry and R. Dixon were managerial employees at both locations. B. Crews was managerial at Railway but moved to commission sales at Princess. P. Dubeau, a technician at Railway, accepted a promotion to Princess as security manager, a managerial post, on condition he could return after a trial period if he wished and he did so. E. Watkins was laid-off from Railway in March 1983, subsequently returned to Railway, then transferred to Princess. An entire department, maintenance agreement sales, was transferred in August 1984 from Railway to Princess. This department contacts customers who did not purchase the "extended warranty" when the product was bought and, again tries to sell that warranty. Shaw, Franks, and McGinn were affected by this transfer. Finally, P. McNeely moved from part-time in the merchandise control office at Princess to full-time maintenance agreement sales at Railway then back to Princess in various sales departments.

14. The merchandise control office (mco) is responsible for the unit control of inventory, monitors inventory (and, not unexpectedly, works with department managers and sales staff in this regard) and orders product, as needed, through various mechanisms. The mco is located on the second floor at Princess, down the hall from the customer convenience centre, and shares space with the accounting office.

15. The customer convenience centre (ccc) handles customer complaints and problems at the counter or by telephone. Staff takes payments on accounts, issues credits to accounts, gives cash refunds, opens customer accounts and cashes cheques for customers. Merchandise to be exchanged may be taken to the relevant merchandise department but is generally returned to the ccc. The ccc also charges for gift wrap service and sells lottery tickets. Customers can order parts through the ccc which maintains a parts catalogue on microfiche.

16. The accounting staff, consisting of seven full-time and seven part-time employees, is responsible for the financial control of inventory, keeps the financial records, performs audits on the sales floor at Princess and Railway and balances the cash registers on a daily basis.

17. The Dalton Street transfer terminal is the stop-over point for the tractor trailers on the Toronto to Montreal route. Product is distributed from the terminal to Railway, Princess, outlying catalogue sales stores and other retail stores in Belleville, Cornwall, Peterborough and Ottawa. Dalton operates the "peddle run" in the area, including the outlying catalogue stores, to pick up product to be repaired and deliver new and repaired goods. The management reports directly to Toronto.

18. Counsel for the respondent submitted there was sufficient community of interest, according to the criteria in *Usarco Limited*, [1967] OLRB Rep. Sept. 526, between Railway and Princess to warrant a single bargaining unit. Specifically, it was argued the evidence established there was a considerable overlap in functions (e.g., shipping, receiving, marking, warehousing) at both locations. The conditions of employment were the same: common salary structure, hours of work, benefits, appraisals system, probationary period, policy re: transfers, promotions, lay-offs. The company administers both locations through the same hierarchy. That is, a number of managers have responsibility for both locations. Further, the service centre manager reports through the operating superintendent to the store manager and retains control over the maintenance agreement sales staff via the operating superintendent. There was a common safety committee, a single payroll and personnel file. Counsel stressed the transfer of employees between locations, as documented in Exhibit 1, including the "bumping" during

the lay-off in 1983 as indicating a close relationship between the locations. The skills of employees were argued to be similar. Geographically, the two facilities are approximately 4 km. apart.

19. Counsel also emphasized that the respondent's argument was based on functional coherence and interdependence. That is, the Railway facility could not exist apart from Princess. Thus, the Board's jurisprudence which grounded certification of separate facilities which were "repeating" units was distinguished. *F. W. Woolworth Co. Limited*, [1981] OLRB Rep. June 653; *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250 were referred with respect to this line of jurisprudence. In contrast, here, the functions originally were all performed at Princess, then some functions were transferred to Railway but the integral connection was maintained. And, this "functional" approach grounded the respondent's separation of the Dalton terminal from the Princess-Railway unit.

20. Counsel asserted the other factors in *Usarco supra*, were also satisfied. There was centralization of managerial authority. There was an economic advantage to the company of one organization which would be lost if forced to treat the locations as separate units. The source of work for Railway was Princess, except for minimal amounts. Finally, counsel stated there was no factual dispute with respect to the merchandise control office, the customer convenience centre and the accounting office. These operations were closely connected to the sales and service functions and, it was argued, should be included in the bargaining unit.

21. Counsel for the applicant submitted that Princess and Railway were separate and distinct facilities. Railway is either a "warehouse" or a "service centre". If a "warehouse", counsel argued that the warehouse operation has always been treated by the Board as separate from the retail or production facility; *MacDonald's Consolidated Limited*, [1973] OLRB Rep. Jan 3; *Leons Furniture Limited*, [1976] OLRB Rep. May 232; *Bennett Foods Limited*, [1979] OLRB Rep. Dec. 1134; *Barca's Bakery Limited*, [1971] OLRB Rep. Mar. 139 were cited as examples. If Railway was a "service centre", then this facility could still stand alone as a bargaining unit given the Board's approach in *K Mart, supra*, and *F. W. Woolworth, supra*. Moreover, it was argued the skills of the employees were distinct: Railway repairs product and warehouses product while Princess sells product. Selling parts at a counter is not the same as selling in a retail location where entrepreneurial skills are needed. Some overlap in classifications like shippers, receivers, etc. occurs between every retail and warehouse operation. Railway is not entirely dependent upon Princess as it services outlying catalogue stores and repairs product purchased elsewhere. The salary structure differs between Railway and Princess, as did the hours of work. Employees were hired directly at Railway on at least two occasions. The interchange of employees between facilities is numerically insignificant. It was also noted Railway and Princess were physically separate, about 4 km apart. Counsel also argued the merchandise control office, customer convenience centre and accounting were not "sales" operations and, thus, appropriately belong in an office unit. The sale of lottery tickets at the customer control centre did not change the nature of that department. Finally, counsel argued that the respondent had not presented an argument sufficient to join both facilities and asked the Board to recognize the employees' wishes and follow Board practice to find that the Railway location constituted an appropriate bargaining unit.

22. The development of the Board's approach over the years from municipality-wide units to single stores in the department store sector is succinctly stated in the following passages from *K Mart, supra*:

12. The Board is called upon to shape bargaining structures over a wide segment of both the manufacturing and service industry operating within the province, including hospitals, universities, municipalities and retail establishments. Each of these sectors has presented its own special problems *vis-a-vis* bargaining unit determination. In dealing with retail stores the single location unit versus a municipal-wide unit, where the employer operates at more than one location within the municipality, has been the major bargaining unit issue to be addressed. The issue was first dealt with in respect of retail food stores where the Board determined as a general matter that the appropriate unit should encompass "all employees at its stores" in the municipality. (See *Oshawa Wholesale*, [1965] OLRB Rep. Feb. 584). The Board's practice in this regard appears to have successfully balanced the statutory objectives referred to earlier in that the retail food industry is highly organized and bargaining is conducted within structures which have proven to be effective.

13. The Board's practice of certifying for all stores within the municipality in retail food stores was applied by the Board to retail service stores in *Goodyear Service Stores*, *supra*, where the Board, over the objection of the employer, certified the union as bargaining agent for eight service stores within the municipality of Metropolitan Toronto. The Board held in that case that,

"... where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area it would not, generally speaking, be conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar bargaining interests. Such a situation where some employees might be represented by one trade union, others by another and others not at all would be invidious from the employer and trade union points of view as well as from the points of view of most individual employees.

The Board, therefore, considers that the policy it has followed in cases of retail food markets, variety chain stores and brewers' warehousing stores, and which has frequently been applied in other cases involving retail or service stores, should be adopted as its general policy in cases of retail or service stores where the interests of employees throughout a group of stores can be said to be essentially similar as in the present case.

The Board found that all employees at all the respondent's service stores within the municipality with certain named exclusions, to be a unit appropriate for collective bargaining. For purposes of our analysis it is important to note that the unit determination in the *Goodyear* case recognized the pattern of bargaining and did not in anyway impede the access to collective bargaining of the employees in any one store. Although commenting that "this is not a relevant factor in determining the bargaining unit" the Board noted that "the applicant has members in each store and in each case but one, this membership constitutes a majority of the employees in the store". Furthermore, no mention is made of the interchange, or lack of interchange,



of employees between stores in the *Goodyear* decision; a factor of major significance in determining if a community of interest exists between employees at separate locations. The *Goodyear* decision, *supra*, is cited with approval in *Cybermedix Limited*, [1979] OLRB Rep. Aug. 743 where the Board certified the union as bargaining agent for the employees of the company at all seventeen of its locations within Metropolitan Toronto. The employer in that case operated a medical testing laboratory service. In the *Cybermedix* case, as in *Goodyear*, the union had organized at all locations and notwithstanding the fact that "there may be no substantial interchange of employees between locations and the functions of hiring and supervision are confined within the locations", the municipal-wide unit was found to be appropriate.

14. In a number of recent retail cases the Board has made it clear that there is no presumption in favour of the most comprehensive unit and has declined to follow the policy enunciated in the *Goodyear* case, *supra*. The circumstances under which the Board has done so illustrate the delicate balancing which must be done by the Board under section 6(1) of the Act. In these cases that Board found a single location unit to be appropriate where

- (1) the company operated from a number of retail locations within the municipality,
- (2) local management had control over day to day employment relations,
- (3) there was little or no interchange of employees between locations,
- (4) the union (in contrast to *Goodyear*, *supra*, and *Cybermedix supra*) had organized on a one location basis, and
- (5) a broader based structure might significantly impede employee access to collective bargaining.

See *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *McDonald's Restaurant of Canada Limited*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7 and *Commonwealth Holiday Inns of Canada Limited*, [1970] OLRB Rep. Oct. 749). The balance which has been struck by the Board in the circumstances of these cases has been aptly described in the following passage from the *Canada Trustco* decision, *supra*.

"In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all."

15. The Canada Labour Board came to essentially the same conclusion on a review of the same considerations in *Service Office and Retail Workers Union of Canada and Canadian Imperial Bank of Commerce*, [1977] 2 Can. LRBR 99. In that case the Canada Board reversed a longstanding practice and found that a single branch unit of bank employees was both viable and best achieved the purposes of the Code. In *Woodward Stores (Vancouver) Ltd.*, [1975] 1 Can. LRBR 114 the British Columbia Labour Relations Board, in certifying a unit of bakery employees at three department stores, observed that "it remains a fact that if the Board were to focus on the long-range enquiry of how collective bargaining should be carried out in the department store industry, it will likely achieve the short run result that collective bargaining will not be conducted at all". The British Columbia Board, while putting the parties on notice that it would use its powers to restructure existing bargaining units if a proliferation of small units grew up in the department store industry, opted in favour of facilitating the attainment of collective bargaining for those who chose it in the short term.

16. The National Labour Relations Board, which has had extensive experience with the certification of retail chain operations, adheres to a policy under which a single store in a retail chain is presumptively appropriate for bargaining. Absent a degree of functional integration sufficient to destroy its separate identity the Board will not deny separate groups of employees possessing a community of interest the right to express their wishes concerning collective representation. (See *Haag Drug Co.* 67 LRRM 1289; *Big N Dept. Store* 81 LRRM 1361; *Dayton Hudson Corp.* 94 LRRM 1207; *Erickson Birron Co.* 94 LRRM 1048 and *Renzehis Market Inc.* 99 LRRM 1189.)



18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern or organization. Furthermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

23. It is also appropriate at this point to summarize the criteria set out in the *Usarco* decision, *supra*:

- (a) community of interest
  - nature of work performed
  - conditions of employment
  - skills of employees
  - administration
  - geographic circumstances
  - functional coherence and interdependence
- (b) centralization of managerial authority
- (c) economic factor
- (d) source of work.

24. The Board is of the view that the criteria enunciated in *Usarco, supra*, when applied to the instant case do not lead to a single bargaining unit comprising Railway and Princess. For example, the nature of the work performed is not the same. Princess is the retail operation; Railway combines warehousing and service centre functions. That Princess has classifications such as receiver, shipper, marker, etc. does not strengthen the relationship with employees at Railway who perform similar functions. Rather such classifications exist at Princess in order to get the products to the sale floor for purchase by the customer and, in some instances, from the sales floor to the customers' homes. Quite simply, Princess is concerned with *selling*, the sales function is paramount. Railway is predominantly concerned with *storing* (warehousing) goods and *repair* of goods (service centre). That Railway "sells" parts directly to customers does not change this. In fact, comparison of the selling function underscores the differences in operation. That is, at Princess, customers wander around the various departments in order to examine and purchase the merchandise. At Railway, however, customers must inform the staff at the counter of their order for parts. Likewise, entrepreneurial skills are most prevalent at Princess compared with repair technicians' and warehousing skills at Railway. The common "skills" of receiver, shipper, etc. do not significantly blur the disparity. The difference is further revealed in the salary structure. At Princess employees are hourly-rated, commission with a draw and salary plus commission; at Railway, all employees are hourly-rated. Under "conditions of employment", the Board also notes the difference in hours worked at each location. And, not in dispute, is the geographic location of the two facilities as approximately 4 km apart.

25. The respondent emphasized the historic relationship between Princess and Railway and the "continued connection" particularly through the transfer of employees and common management hierarchy. Firstly, the Board does not place much weight on the historical relationship given the present separate locations. That is, the question whether the service/warehouse group and the retail group had a sufficient community of interest to justify a single



bargaining unit when both were at the one location is not before this Board. Secondly, the Board does not regard the "continued connection" as extensive. For example, the number of "transfers" between locations an exhibit 1 comprises an insignificant proportion of the total number of employees at both locations even during a single year let alone when the total number of transfers is compared with the total number of possible transfers. Moreover, the total on exhibit 1 must be discounted to remove transfers to and from managerial positions. As noted in *F. W. Woolworth, supra*, (at para. 24) these types of moves are not the type of transfers that generally affect the bargaining process. The wholesale transfer of the maintenance agreement sales staff also inflate the "intermingling" statistics in the Board's view. When exhibit 1 is thoroughly analyzed, then, the movement between locations is more indicative of a chance occurrence rather than reflective of a planned or structural interrelationship where employees are regularly shifted between locations for reasons of increased efficiency or career development.

26. It is true that the service centre manager reports to the operating superintendent and then to the store manager. However, the service centre manager has hired employees directly with the "formalities" completed at Princess subsequent to the employee commencing work. The managers at Railway operate within established company guidelines in granting time off, for example. It is also true that the maintenance agreement sales staff, now located at Princess, continue to report to the service centre manager but *through* the operating superintendent, a fact which, in the Board's view, says more about the actual contact of these staff with management than the formal reporting line. Moreover, the Board is cautious about relying on a consolidated management hierarchical structure in determining the composition of an appropriate bargaining unit. Counsel for the respondent asserted that the creation of separate bargaining units for Railway and Princess would force a radical reorganization by management to deal with the two locations separately. However, the evidence did not support such a sweeping assertion.

27. The two locations are certainly functionally related; Railway does "support" the sales function at Princess. However, such a broad generalization also may be used to describe the relation of production and retail operations or warehousing and retail operations, operations which have traditionally fallen within distinct bargaining units. And, the Board would comment that Railway is not totally dependent on Princess for its source of work. The Board further adds that the "source of work" criterion, as used in *Usarco, supra*, is not applicable to the instant case. Railway and Princess do not have this factor in common.

28. This, the Board finds that, on the criteria enunciated in *Usarco, supra*, Railway and Princess do not have a community of interest. The Board notes, in the alternative, that had the criteria in *Usarco* been satisfied, the factors outlined in paragraph 22 above would have led to a similar result, namely, separate bargaining units. That is, the company operates from more than one retail location within the municipality. (This analysis accepts the characterization of Railway as "retail" in the broad sense urged by the respondent). Local management has significant (although not total) control over day-to-day employment relations. The interchange of employees between locations is virtually non-existent and certainly statistically insignificant. Transfers in and out of the bargaining unit do not assist in establishing an intermingling of employees at both locations. The applicant has organized, at least initially, on a one location basis. And, finally, a broader based structure would significantly impede employee access to collective bargaining. The applicant would be faced with organizing a much larger group of employees, heterogenous in nature and physically located at some distance apart.

Thus, the Board considers that Railway, as a single location, constitutes an appropriate unit, a viable unit for collective bargaining purposes.

29. The Board intends to deal only briefly with the merchandise control office (mco), customer convenience centre (ccc) and accounting department. Counsel for the respondent recognized the Board practice with respect to the normal exclusion of office and clerical staff from the retail or production staff. The argument for inclusion in the larger bargaining unit really was grounded on the relatively few employees in these areas. Having regard to the undisputed duties of employees in these areas, the Board finds that such employees do not share a community of interest with the sales staff. This separateness is not blurred by the "selling" of lottery tickets at the ccc and is enhanced or reflected in the physical location of these areas in relation to the sales departments. The Board, then, is not persuaded that the usual practice of excluding office and clerical staff from the retail or production unit should not be followed in the instant case.

30. Accordingly, for the above-stated reasons and having regard to the partial agreement of the parties, the Board finds the following constitute units of employees appropriate for collective bargaining:

#### BARGAINING UNIT #1

All employees of the respondent at its service centre in the City of Kingston save and except foremen, managers, supervisors, persons above the rank of foreman, manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

CLARITY NOTE: For purposes of clarity, persons associated with the portrait studio, key shop and Allstate Insurance are not employees of the respondent and are not included in the bargaining unit. Also for clarity, the term "service centre" refers to the facility at 70 Railway Street in the City of Kingston.

#### BARGAINING UNIT #2

All employees of the respondent at its service centre in the City of Kingston regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, managers, supervisors, persons above the rank of foreman, manager and supervisor, security staff, personnel department staff, management trainees and office and clerical staff.

CLARITY NOTE: For purposes of clarity, persons associated with the portrait studio, key shop and Allstate Insurance are not employees of the respondent and are not included in the bargaining unit. Also for clarity, the term "service centre" refers to the facility at 70 Railway Street in the City of Kingston.

BARGAINING UNIT #3

All employees of the respondent at its retail store at Princess Street in the City of Kingston save and except assistant sales managers, supervisors, persons above the rank of assistant sales manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

CLARITY NOTE: For purposes of clarity, persons associated with the portrait studio, key shop and Allstate Insurance are not employees of the respondent and are not included in the bargaining unit.

BARGAINING UNIT #4

All employees of the respondent at its retail store at Princess Street in the City of Kingston regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except assistant sales managers, supervisors, persons above the rank of assistant sales manager and supervisor, security staff, personnel department staff, management trainees and office and clerical staff.

CLARITY NOTE: For purposes of clarity, persons associated with the portrait studio, key shop and Allstate Insurance are not employees of the respondent and are not included in the bargaining unit.

31. This matter is hereby referred to the Registrar to be scheduled for hearing before this panel on the remaining issues.

**DECISION OF BOARD MEMBER A. GRANT;**

1. I do not agree with the decision of the majority. In my view the dividing, as dictated by space limitations, of a single group of employees having a historical and ongoing community of interest does not provide the necessary base for compelling argument in support of a separate bargaining unit.
  2. The evidence considered, it remains that the Princess and Railway locations are administered through a common management hierarchy. Both are served by a common safety committee, personnel manager, social club, and other overlaps continue in place. Though not extensive, example exists with respect to the ready and easy interchange of personnel between Princess and Railway. Further, and as recently as 1983 when a company lay-off was required, a common to both, Princess and Railway seniority list governed with respect to "bumping".
  3. I further believe it to be rather obvious that not only the company but also the employees concerned have long considered the two locations to be one operating unit, physical separation not withstanding. I so find.
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**0903-84-OH; 0904-84-OH; 0905-84-OH; 0906-84-OH** Donald Putman, Norman Rae, John McKinnon and Thomas Edward Monger, Complainants, v. **Tecumseh Products of Canada, Limited**, Respondent

**Health and Safety — Practice and Procedure — Fourteen month delay in filing safety complaint — Complainants knowledgeable as to procedure under Act — No reasonable explanation for delay — Board declining to inquire into complaints**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

**APPEARANCES:** *R. E. Seabrook for the complainants; David I. Wakely, William E. Shadwick, Arthur Brown, Frederick I. Nugent and Christine E. Moore for the respondent.*

**DECISION OF THE BOARD;** January 8, 1985

1. This is a complaint under section 24(2) of the *Occupational Health and Safety Act* (OHSA) alleging that the respondent violated section 24(1) of that Act in terminating the employment of the four grievors.

2. The four grievors had each filed separate complaints and the Board hereby directs that the above complaints be and the same are hereby consolidated.

3. The respondent raised four preliminary objections. Firstly, the complaints should be dismissed because of the delay between the terminations and the filing of the complaints. Secondly, the complainants were “supervisors”, not “workers”, at the time of the terminations and, hence, were not covered by the Act. Thirdly, as the complainants had not invoked the statutory process at the time of the terminations, the Board should not now try to “reconstruct” whether there was reasonable cause for the refusal to do work, even assuming that the four complainants were covered by the Act and given direct orders (and both assumptions were disputed by the respondent). Finally, if the complainants contended that fear of reprisals or social ostracism was the basis for the refusal, these reasons fall outside the concept of “safety” intended to be covered by the legislation. The objections, and the complainants’ response, are dealt with in detail *infra*.

4. The Board briefly notes two procedural rulings with respect to the preliminary objections after hearing submissions of counsel for the parties. Firstly, the Board directed that counsel for the complainants summarize all the facts intended to be proven relating to the issue of the delay in filing the complaints. Secondly, the Board then decided to hear *viva voce* testimony with respect to the matter of delay so that such testimony would be subject to cross-examination. The respondent was also directed to lead *viva voce* evidence with respect to prejudice if the respondent so wished.

5. Counsel for the complainants and the respondent agreed on or did not dispute a number of facts at various points throughout the hearing. These facts are herein summarized:

- (a) the respondent advised employees at its Tecumseh plant to prepare for shipment of certain parts stored at the plant;
- (b) none of the complainants requested (at the time of the alleged orders)

an inspection of the job site by OHSA officials in accordance with section 23 of the OHSA.

- (c) four individuals were hired by the respondent in late June 1983 to replace the four complainants;
- (d) an action was commenced in the Supreme Court of Ontario on July 25, 1983 claiming damages for wrongful dismissal plus special damages for pain and suffering;
- (e) with respect to that suit, the parties had exchanged pleadings and completed discoveries; there had been several interlocutory motions heard; the cases had been placed on the trial list and were expected to be heard by Spring 1985 at the latest;
- (f) one McBeth, the president of the respondent's U.S. company, died in May 1984;
- (g) one Creery, an official with the OHS branch of the Ministry of Labour spoke with the complainant McKinnon in early May 1983 but had no independent recollection of the contents of the discussion except that he would have referred McKinnon to one Myleman, another official in the OHS branch. [The Board notes that this agreement makes it unnecessary for the Board to rule on an objection to the admissibility of McKinnon's testimony relating Creery's response to his telephone call.]

6. Counsel for the complainants called one witness, McKinnon, with respect to the delay; the other three complainants did not testify. The respondent called no witnesses with respect to the issue of prejudice resulting from the delay.

7. The Board considered the credibility of the witness according to the usual factors, including the consistency of his testimony, the firmness of his recollections, his apparent ability to resist the influence of self-interest to modify his recollections, his demeanour while testifying, his responses in cross-examination and what seems to the Board to be reasonably probable when the circumstances and the testimony of the witness are considered. Based on those considerations, the Board makes the following findings of fact, in addition to the above-noted agreed facts.

8. McKinnon, aged 56 and an employee for over twenty years with the respondent, held the position of production manager. It was not disputed that Rae was general foreman and Monger and Putman were line foremen. All four were managerial employees within the meaning of section 1(3)(b) of the *Labour Relations Act*. The complainants were suspended with pay on May 6, 1983 and, then, later that day, terminated from their positions. For clarity, the respondent asserts the complainants were terminated for their refusal to perform certain work while the complainants contend this refusal was grounded in concerns for safety. As noted, however, this inquiry is solely concerned with the question of delay in filing the complaints and not with the merits of the allegations.

9. On the Monday following the termination, McKinnon called the Ministry of Labour OHS branch to speak with P. Goddard the inspector who usually visited the plant, thus, was known to McKinnon. Goddard was unavailable and McKinnon informed Goddard's supervisor, Creery, that the four had been terminated. McKinnon was given a Toronto telephone number to call if he wished to pursue the matter immediately and (as noted in paragraph 5, (g)) McKinnon was referred to Myleman, another OHS official in London. The Board considers McKinnon's recollection of the conversation with Creery as self-serving and embellished and is not accepted as fact.

10. McKinnon was in Toronto several days later, called the number he had been given and spoke with a receptionist in the Ministry of Labour. McKinnon was referred to a taped message dealing with Employment Standards legislation but, after hearing the message, did not wait the required brief period before the call could be relayed to a lawyer to deal with specific questions as he had already retained counsel. The receptionist did forward claim forms from the Employment Standards Branch but McKinnon did not complete and return the forms. McKinnon made no effort to contact the OHS branch in Toronto and could not give a reason for not doing so except that he was "not in the best condition at the time" because "his nerves were shot" and because of a lack of sleep.

11. McKinnon had, however, retained counsel. All four individuals met with counsel shortly after the terminations and instructed counsel to contact the company. McKinnon testified the health and safety concerns were raised at the second meeting of the four with counsel. However, counsel was not instructed to file a complaint under the OHSA. Rather, a suit for wrongful dismissal was commenced (as set out in the agreed statement of facts).

12. McKinnon did nothing to follow up his initial call to the local OHS Branch. McKinnon testified that he was drinking heavily from June to approximately January, 1984. For several months in late fall of 1983, he was alone at his cottage. However, he was driven into town on several occasions and met with the other three complainants. McKinnon could give no reason why the other three did not pursue the health and safety issue during this time period. In October 1983, McKinnon did ask his son to ascertain whether an inspector had visited the plant after the strike ended; McKinnon was informed there had been no such visit to follow up on the complaint.

13. From January 1984 onwards, McKinnon was under a psychiatrist's care and was "trying to sort out his problems." At discovery on May 9, 1984, McKinnon saw some notes of one Rappen, a company official, which made reference to the OHSA in connection with the May 1983 terminations. In McKinnon's view, this was "proof" that the four complaints had raised the OHSA at the time of their terminations. This was discussed with counsel who then contacted the Board by letter dated May 23, 1984 seeking to file complaints under the OHSA. The complaints themselves were filed July 3, 1984.

14. McKinnon was also chairman of the plant safety committee from the inception of the committee to his termination. Rae was co-chairman and considered by McKinnon to be the most knowledgeable person at the plant with respect to safety matters. McKinnon had also attended IAPA meetings and seminars in 1978 when the legislation was enacted. On one occasion, an employee (K. Wilkinson) had refused to perform a job he felt was unsafe. McKinnon called in an OHSA inspector from the local office in London who investigated the matter. The inspector (and a doctor who accompanied the inspector at the latter's request) assessed the situation and found no hazard but suggested trying to accommodate the employee.



The matter was, in fact, resolved to everyone's satisfaction that day and did not proceed further. On cross-examination, McKinnon stated that, if the matter had not been resolved, he would have to read the OHSA to find out what steps he was allowed to take. The Board does not consider this is a credible statement from an individual with specific responsibilities for health and safety at the plant and who had attended the meetings and seminars as described.

15. Counsel for the respondent submitted the complaints should not be heard because of the fourteen month delay between the terminations on May 6, 1983 and the filing of the complaints on July 3, 1984. Delays of thirteen months were considered "extreme" in *CCH Canadian Limited*, [1977] OLRB Rep. June 351 and *Luciano D'Alessandro*, [1983] OLRB Rep. Oct. 1699. A delay of 2-1/2 years was also found to be excessive in *Sheller-Globe*, [1982] OLRB Rep. Jan. 113. These cases as well as *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420 and *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446 were referred to as illustrative of the Board's position that complaints must be filed expeditiously. Here, two of the four had specific knowledge of the OHSA by virtue of their duties as co-chairpersons of the plant health and safety committee. McKinnon had actually dealt with one complaint under the OHSA. Further, counsel had been retained without delay after the terminations and the civil suit launched. The single telephone call to the London OHSA office had not been followed up. The filing of the OHSA complaints really amounted to a tactical move on the part of the complainants to involve the respondent in further litigation and, it was argued, constituted an abuse of the Board's processes. Counsel also pointed to the one year limitation period for prosecutions under the OHSA (s.40) in support of his position that a delay of more than one year in filing a complaint was excessive. Counsel submitted the complainants had an obligation to explain the delay and had not satisfied that obligation. The assertion that Rappen's notes changed the complainants' assessment of the OHSA complaint was not credible since the complainants' own knowledge of the facts was no greater in the spring of 1984 than it had been in May 1983. Moreover, if the delay was attributable to the complainants' solicitor, solicitor inadvertence or error is not a ground for hearing the complaints. Even allowing for McKinnon's alcohol problem until January 1984, this did not explain his inaction from January 1984 to the date the complaints were filed or the inaction of the other three throughout the entire period. Counsel, however, also submitted that McKinnon's testimony was not credible with respect to the extent of his incapacity during the fall 1983, with respect to the conversation with Creery or Rappen's notes.

16. The respondent submitted he need not show actual prejudice had been occasioned by the delay given the length of the delay but, in fact, there had been such prejudice. The company president, McBeth, had died in May 1984 and, further, a document was no longer available. Moreover, the civil suit did not present a possibility of reinstatement of four individuals who had been replaced in June 1983. The respondent had incurred considerable costs thusfar with respect to the civil suit. A promptly filed OHSA complaint would have avoided all those costs and prejudice. However, it was submitted, having filed the civil suit and having delayed for fourteen months in filing the OHSA complaint, the complainants should be held to their election of forum for relief.

17. Counsel for the respondents also argued that, as managerial employees with supervisory responsibilities *vis-a-vis* the "workers", the four complainants were excluded from the protection of the OHSA. The protections of the OHSA were extended only to "workers". Indeed, "supervisors" had specific responsibilities under the OHSA and were subject to a separate and distinct liability for violations. "Person" had been used in other sections of the OHSA where a broader meaning was intended; thus, "worker" in section 24(2) should be given

a narrow meaning. Counsel contended that one's status as a "worker" or "supervisor" should be determined according to the "prime function" test in arbitral and Board jurisprudence. A "supervisor" could over time become a "worker" but, it was asserted, that status could not change on a minute-by-minute basis. If the legislation was so interpreted, the opportunities for mischief would be limitless as supervisors could "avoid the duties and responsibilities of supervision by claiming worker status". Supervisors ordered to perform unsafe work and terminated for refusing had a civil remedy for wrongful dismissal rather than a remedy under the OHSA. There was nothing inherently improper in "workers" having a greater remedy (i.e., to reinstatement) than "supervisors" (who could only receive damages in a civil suit).

18. In view of the Board's disposition of the complaints, it is not necessary to set out in detail (beyond that in paragraph 3 above) the respondent's third and fourth preliminary objections. The Board also does not find it necessary to deal further with the respondent's submission that the complainants are excluded from the protection of section 24 of the OHSA.

19. Counsel for the complainants submitted the delay was not unreasonable. The one year limitation period in respect of prosecutions under the OHSA was not a limitation with respect to filing complaints under section 24. Further, the launching of the civil suit did not bar an OHSA complaint. The respondent had suffered no prejudice through the delay. That is, the company had been put on notice that the terminations would be litigated by virtue of the civil suit. McBeth was not present at the events and, thus, his death was irrelevant. Counsel argued McKinnon had initiated contact with the OHSA branch in London but the inspectors had not conducted an investigation after the strike ended. Counsel's initial assessment of the case was to proceed with the wrongful dismissal suit only. The production of Rappen's notes had led to a reassessment of the situation. Filing of the OHSA complaints had followed relatively soon thereafter. Any delay resulting from counsel's appraisal of the circumstances in May 1983 should not be held against the complainants. In summary, counsel submitted the Board had the jurisdiction to hear the complaints on the merits and should do so given the circumstances and mitigating factors. Here the delay was neither unreasonable or unexplained. However, it was asserted the Board could address the issue of delay, even if actual prejudice was proved, in determining the appropriate remedy.

20. Counsel for the applicant also rejected the respondent's assertion that the complainants were excluded from the protection of the OHSA. As stated in paragraph 18, this aspect is not dealt with further.

21. It was not disputed that, by virtue of section 24(3) of the OHSA, the Board has a discretion whether or not to inquire into a complaint filed under section 24(2). The Board described its approach to delay in filing complaints alleging violations of section 68 of the *Labour Relations Act* in *The Corporation of the City of Mississauga, supra*:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it — including the employees — are entitled to expect that claims which are not asserted within

a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited*, [1966] 18 L.A.C. (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay — holding, in most cases, that it will simply take this matter into account in determining the remedy if the statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship — quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involved retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience, take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

22. Moreover, in *Sheller-Globe Canada Limited*, *supra*, the Board's dismissal of a complaint after entertaining evidence and submissions with respect to the delay in filing and without an inquiry into the merits was upheld on judicial review by the Ontario Divisional Court (unanimous judgment dated June 28, 1983).



23. In the Board's view, these considerations also apply with respect to a complaint under section 24(2) of the OHSA. Indeed, expeditious resolution of alleged violations of health and safety legislation is even more desirable.

24. The Board is faced with what are perhaps unique, and certainly unusual, circumstances in this case. A fourteen month delay is a considerable time period and, in the Board's opinion, imposes an obligation on the complainants to explain the delay. The Board finds that the explanation tendered is simply not reasonable. These complainants could not be described as "unaware of their statutory rights" (to use the phraseology of the *City of Mississauga*, *supra*). McKinnon and Rae were co-chairmen of the plant health and safety committee; McKinnon, at least, had held that position since the committee's inception. Moreover, McKinnon had attended IAPA meetings and seminars in 1978 when the legislation was enacted. McKinnon had even been involved in a health and safety complaint, although that complaint was settled without further recourse to the statutory scheme. Thus, the complainants possessed considerable knowledge of the OHSA, at least relative to what would be expected of most employees. This knowledge must weigh heavily against the complainants in assessing the delay.

25. The complainants also had the benefit of legal counsel almost immediately after the termination. Counsel was instructed to contact the company and did so. Counsel was later instructed to initiate a suit for wrongful dismissal and also carried out those instructions. The complainants apparently did not instruct counsel to file a complaint under section 24(2) of the OHSA until May or June 1984. The complainants may well have relied on counsel's advice as to how to best proceed. If that advice was incorrect or inappropriate, that is a risk the complainants, and not the respondent, must bear. Again, to refer to the *City of Mississauga* case, the complainants, having counsel, cannot be regarded as inexperienced so as to be entitled to some latitude to "properly focus their concerns and file a complaint." In this regard, the Board would also comment that the production of Rappen's notes on discovery in April 1984 is irrelevant to the assessment of the delay in this case. Whether the notes may or may not have assisted in proving some facts, the notes did not alter the circumstances surrounding the terminations. The production of the notes cannot be viewed as constituting the first occasion when the complainants become aware or should reasonably have become aware of the alleged statutory violation.

26. The Board is sympathetic to McKinnon's drinking problem and his efforts to deal with that problem. However, McKinnon's condition from the summer 1983 to January 1984 does not amount to a reasonable explanation for the delay in filing the complaint for several reasons. Firstly, the Board notes that McKinnon's condition had significantly improved by January 1984 yet the complaint was not filed until July 3, 1984. Secondly, even during the period when McKinnon was drinking heavily, he still was in contact with the other three complainants and could have asked them to act on his behalf since all four were acting in concert in responding to the terminations and had retained the same counsel. But, most importantly, there were *four* complainants. Even assuming McKinnon was incapacitated for part of the period, there was no credible explanation offered for the inaction of the other three complainants. It is just not sufficient to say that the other three relied on McKinnon to act for them. Thus, the Board considers that the other three complainants offered no reasonable explanation for the delay and McKinnon's condition was not sufficiently incapacitating nor of sufficient duration to constitute a reasonable explanation for the delay with respect to his complaint alone, particularly given the other circumstances.

27. The Board would add that a single telephone call to the OHSA branch in London followed up only half-heartedly months later through a son's inquiry as to whether an inspector had visited the plant is not a reasonable course of conduct when the delay involved is for such a considerable period. The Board also does not regard the Toronto call to the Employment Standards Branch as a "follow-up" of the health and safety issue given McKinnon's knowledge of the OHSA.

28. Thus, for the above reasons, the Board finds that the complainants have not offered a reasonable explanation for the lengthy delay involved in filing the complaints. Given the Board's assessment that the explanation for the delay is unreasonable, the Board need not deal with the issue of actual prejudice to the respondent occasioned by the delay beyond the prejudice inevitably resulting from excessive delay as stated in *City of Mississauga, supra*. Consequently, the Board exercises its discretion under section 24(3) of the OHSA to decline to inquire into those complaints.

29. Accordingly, these complaints are hereby dismissed.

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**1404-84-R** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Westburne Industrial Enterprises Ltd.**, Respondent

**Bargaining Unit — Practice and Procedure — Individuals employed as students on application date — Their request to continue employment after return to school accepted by employer — Whether affecting student status for purposes of application — Board not staying proceedings pending disposition of application for judicial review**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen and Jim O'Donnell for the applicant; W. R. Thornton, G. S. White and R. Abramovitch for the respondent.*

**DECISION OF THE BOARD;** January 29, 1985

1. By decision dated October 16, 1984, (now reported at [1984] OLRB Rep. Oct. 1525) the Board (differently constituted) appointed a Board Officer to inquire into and report back on various matters with respect to several named individuals, as set out in paragraphs 15 and 16 of that decision. The Board reconvened proceedings on January 18, 1985 to hear submissions on the Officer's report.

2. The parties met with the Board Officer, B. McLean, on November 14, 1984. Appearing for the applicant were Ken Petryshen and Jim O'Donnell; for the respondent, W. R. Thornton and Gerald Champagne. The agreements reached and proceedings conducted on that date were without prejudice to the respondent's request for reconsideration dated October 31, 1984, a request which was before the Board at that time.

3. At that meeting, the applicant agreed that Brad Aitken was properly included in the bargaining unit. Further, where the applicant formerly asserted that Andrea Knies should be excluded from the bargaining unit as an “office” employee *and* as a “student employed during the school vacation period”, the applicant now restricted its objection to the latter category. Finally, the respondent agreed that Denis Bouchard should be excluded from the bargaining unit as a part-time employee.

4. For clarity, the Board notes at this point that the respondent, subsequent to the Board’s ruling on the “student” issue (see para. 10, below), also agreed that Cindy Statham should be excluded from the bargaining unit as an “office” employee.

5. At the hearing on January 18, 1985, counsel for the respondent submitted that it was appearing without prejudice to filing an application for judicial review. Counsel stated that he had been instructed to apply for judicial review of the Board’s decision dated October 16, 1984 although the application had not, as yet, actually been filed. The respondent’s request for reconsideration was rejected by the Board in its decision dated January 11, 1985.

6. The respondent also submitted that the Board stay a decision in this case, (e.g., directing a representation vote, issuing an interim certificate, etc.) pending the ultimate disposition of the application for judicial review. The applicant opposed this submission.

7. The Board ruled orally as follows:

Having considered the submissions of the parties, the Board is not prepared to grant a stay of proceedings in this case. The respondent is, of course, free to pursue its remedies in other forums if it so wishes. The Board would comment that this ruling is in accordance with the Board’s usual practice. Further, while the parties did not refer the Board to any jurisprudence, the Board would cite *Cedarvale Tree Services* (1972) 22 D.L.R. (3d) 40, (1971) CLLC 14,087 (Ont. C.A.). There, the Board was actually served with an application for prohibition on an issue which involved a jurisdictional challenge. The Ontario Court of Appeal held that the Board was entitled to proceed in such circumstances.

8. The respondent submitted that four individuals (A. Knies, S. White, R. White, G. Aitkin) ceased to be “students employed during the school vacation period” when the four requested to continue in the company’s employ after their return to school and the company accepted this proposal. In the respondent’s view, the type of employment requested (i.e., whether full or part-time employment) was irrelevant. Once the request was made and accepted, the four should be classified as in or out of the bargaining unit on the basis of the Board’s usual test for “full-time” or “part-time” status as of the date on which the union applied for certification. On this basis, the four would be considered full-time employees.

9. The applicant asserted that the proper test was the status of the four as of the application date. On that date, the four were “students employed during the school vacation period”. That status was not lost because they requested to be continued by the company in some fashion at a future date. Counsel conceded that one’s status could change from “student” to “full-time employee” in some circumstances but submitted that had not happened in the instant case. August 29, 1984, the application date, fell within the normal school vacation period and the status as of that date could not be changed by some agreement as to the future events.



10. The Board adjourned to consider the submissions and then made the following oral ruling:

The Board has considered the submissions of the parties and reviewed the cases cited by the respondent. Firstly, the Board considers *Holiday Inn (Yorkdale)*, [1976] OLRB Rep. Nov. 709, *St. Raphael's Nursing Home*,\* [1977] OLRB Rep. Sept. 580, and *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116 [three cases cited by the respondent] as irrelevant since those cases dealt with the [appropriateness of] of the "four in seven" rule to determine employee status. The Board also considers the *Muskoka Board of Education*, [1975] OLRB Rep. March 209 [another case cited by the respondent] as not helpful since that case dealt with a dispute as to whether students should be excluded from the applicant's proposed part-time bargaining unit. The comments in paragraph 7 [of the *Muskoka* decision], then, are directed to the submission that "there be a separate exclusion of casually employed students during the school year." This Board agrees with the rejection of that argument in *Muskoka*, *supra*. Here, however, the parties have *agreed* that "students employed during the school vacation period" are to be excluded. The comments in paragraph 7 [in *Muskoka*] cannot be wrenched out of context to assist the respondent here.

In this case, the issue before the Board is "what was the status of the four named individuals on August 29, 1984, the application date". On the agreed statement of facts, three were students employed during the school vacation period [for the first time in the summer of 1984] who "requested continuation of employment while attending school which was to commence September 1984". (See item 3 of paragraph c of the agreed statement of facts in the Board Officer's report). In the Board's view, this request does not change the status of these individuals. Nor does the Board consider the circumstances of the fourth individual, S. White, as so different as to lead to a different result. S. White, was also a "student employed during the school vacation period" who had worked for the company on a part-time basis prior to the summer of 1984. That is, the Board finds as a fact that the four named individuals were "students employed during the school vacation period" and, therefore, are excluded from the bargaining unit.

\**St. Raphael's Nursing Home* also dealt with the appropriateness of including students and part-time employees together in one bargaining unit (see para. 11, below).

11. The Board hereby confirms the above ruling and would add the following comment. The respondent's argument would shift the question of "status" to a date other than the relevant date, i.e., the date on which the application for certification was filed. In effect, the respondent is saying that an agreement as to a future status can change the present status of individuals. There are several flaws with this argument. Firstly, "student employed during a school vacation period" is not a status which is lost if one requests to continue in employment while continuing to attend school after the vacation period is ended. There is nothing in the status of "student employed during the school vacation period" which precludes a part-time employment relationship during the school year. Indeed, such a combination is not unusual and, further, supports the Board practice of placing "students employed during the school vacation period" in a standard bargaining unit with "part-time employees" (see: *St. Raphael's Nursing Home*,

*supra*). Secondly, the respondent's argument requires the Board to turn a blind eye to what the actual request was both in general and in the instant case. Here, the four are working on a part-time basis while attending school. Further, in general, the respondent's argument would lead to the absurd result that if a student requested employment as a part-time security guard for the company (a category which under the *Labour Relations Act* must be excluded from other bargaining units) after returning to school, that individual would be in the bargaining unit for the purposes of the count. The Board does not accept the inconsistency of the respondent's argument which says "not a student" because of a request for continued employment but prohibits the Board from looking at what actual employment relationship resulted or even to look at the request itself. The Board is not here proposing a new test to determine employee status as "in" or "out" of the bargaining unit for the purpose of the count. The Board is merely pointing out the fallacy in the respondent's position. That is, the Board confirms that the status must be determined *as of the application date*. See also *Simpsons Limited*, [1984] OLRB Rep. Oct. 1520 wherein the Board found employees who had received termination notices to take effect at a specified date subsequent to the application date to be included for purposes of the count. The notice as to future "status" (termination) did not affect the status of those employees as of the application date. Finally, as stated in paragraph 10, the Board finds as a fact that the four named individuals were "students employed during the school vacation period" as of that date.

12. For clarity, the Board repeats the bargaining unit description set out in paragraph 3 of the October 16, 1984 decision:

all employees of the respondent in its Distribution Services Division in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 13, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

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**2034-84-U Jack J. A. Widder, Complainant, v. Canadian Union of Public Employees, Local 922, Respondent, v. Board of Education for the City of North York, Intervener**

**Duty of Fair Representation — Unfair Labour Practice — Clause in agreement restricting access to arbitration for probationary employees — Whether negotiating such clause unlawful — Whether failure to inform of court decision permitting probationers access to arbitration breach of duty of fair representation**

**BEFORE:** E. Norris Davis, Vice-Chairman.

*APPEARANCES:* Jack J. A. Widder on his own behalf; Helen O'Regan, Jim Woodward, Bob Smith, Don Lock, W. J. Atkinson and C. A. Pople for the respondent; John P. Sanderson, Q.C. and Wayne McVittie for the intervener.

**DECISION OF THE BOARD;** January 25, 1985

1. This is a complaint alleging that the respondent union has contravened the obligations imposed on it under section 68 of the *Labour Relations Act*.

2. The respondent union is party to a collective agreement between itself and the Board of Education for the City of North York and it is not disputed that the complainant was employed by the Board of Education and was covered by such collective agreement at all relevant times. The Board of Education did not initially file a notice of intervention in these proceedings but did appear at the hearing and was granted status as an intervener. The style of cause herein is amended accordingly.

3. No witnesses were heard and all parties agreed that the matter was to be adjudicated on the following statement of facts:

- (1) The complainant began in the Board of Education as a temporary bus driver on May 20, 1981.
- (2) Under the collective agreement, temporary bus drivers are covered in respect to certain of the agreement's provisions but do not have seniority.
- (3) The complainant continued as a temporary bus driver until December 1983 at which time there developed an opening for a permanent bus driver and the complainant was appointed to that position as of January 1, 1984.
- (4) On January 19, 1984 there was an incident involving lateness on the complainant's part. The Board of Education investigated that incident and after a review of the complainant's record, both as a temporary and a permanent bus driver, determined to terminate his employment.
- (5) This termination was grieved on January 26, 1984 claiming the discharge to be unjust and seeking reinstatement. The grievance was



processed through the grievance procedure with the Board of Education taking the position that the complainant was a probationary employee and as such had no right under the collective agreement to file a grievance respecting his termination. The Board of Education also reserved its rights in respect to the merits of such termination.

- (6) The respondent union was not satisfied with the Board of Education's response in the grievance procedure, and on June 4, 1984 requested the appointment of an arbitrator pursuant to section 45 of the *Labour Relations Act*.
- (7) A settlement officer was appointed in connection with that request and a meeting of the parties was convened by him on June 14, 1984. The settlement officer met with the parties, both separately and together and ultimately a settlement was agreed upon which was put into written form and was signed by all the parties, including the complainant. At the time of signing such document there was no recorded or noted objection by the complainant.
- (8) The terms of settlement document reads as follows:

The union and the grievor, Jack Widder, agree to withdraw from arbitration the grievance dated January 26, 1984 alleging unjust discharge subject to the following conditions:

- (1) The employer will remove all reference in the grievor's file related to the discharge and the grievor will be allowed to quit effective January 26, 1984.
- (2) This settlement resolves all monetary claims between the parties with respect to the above matter.
- (3) This settlement is made without prejudice to either party.

The employer and the union agree that any difference arising from the implementation or failure to implement these terms of settlement may be referred to arbitration in accordance with the expedited procedure in section 45 of the *Labour Relations Act*, with such modifications as may be necessary.

DATED this 14 day of June, 1984, at North York.

- (9) Following the execution of the Terms of Settlement, the Board of Education implemented its terms by expunging from the complainant's file the prior disciplinary record and by recording the termination as a "resignation".
- (10) There were no direct or indirect contacts between the complainant and the Board of Education or the union thereafter until the initiation of the present proceeding on October 25, 1984.

4. The thrust of the complainant's position is best gathered from the complaint itself which states:

On or about Jan. 1/83 the grievor was dealt with by C.U.P.E. Local 922, Robert Smith — President of the respondent contrary to the provisions of section 68 of the Labour Relations Act in that he did on his own behalf or on behalf of the respondent:

enter into a collective agreement that discriminated by creating separate categories for employees who performed the identical duties, responsibilities, work hours and union dues. Such categorising provided coverage under the collective agreement for one group while neglecting the needs of the other. Since I was categorised in the latter group, when fired, I had no recourse, like that available to the other group, to keep my job or to even have my case heard.

The union said that since I wasn't covered by the collective agreement, they suggested that I quit when the NYBE agreed to accept a "quit" in place of "fired".

The complainant does not allege that the union has breached the duty of fair representation in the processing or ultimate settlement of his grievance. As noted in the agreed statement of facts, the settlement was entered in the presence of a settlement officer, and was signed by all the parties, including the complainant. There was, at that time, no recorded or noted objection by the complainant (see paragraph 7 of the agreed statement of facts). The complainant's position before the Board is limited to alleging a contravention of section 68 by the union in its having agreed to section 9.01 of the collective agreement. That section reads as follows:

In the event of an employee who has attained seniority being discharged from employment, and the employee feeling that an injustice has been done, the case may be taken up as a grievance.

5. The complainant, who was unrepresented by counsel, stated that he had been led to believe that section 8.06 of the collective agreement would preclude a favourable consideration at arbitration. That section provides that:

The Board of Arbitration shall not have any power to alter or change any of the provisions of this Agreement or to substitute any new provisions for the existing provisions.

The complainant stated further that he filed this complaint subsequent to receiving advice from someone in the Ministry of Labour that any limitation on his access to arbitration was "illegal" as discrimination by the union.

6. It would seem that the complainant views section 9.01 as a bar to any but seniority employee grievances, and that, moreover, no arbitration board is possessed of the power to alter this term, or to extend any further rights to him. This is the background against which the complainant asks the Board to find that the union's agreement to include section 9.01 in the collective agreement constitutes a violation of its duty to represent all members in the bargaining unit fairly.

7. The Board has long rejected the notion that differential treatment of portions of the bargaining unit necessarily violates section 68. This position was recently explained in *Consolidated Fastfrate Limited*, [1984] OLRB Rep. May 691, as follows:

... The complainant has failed to show how the failure to include this type of a clause applicable to part-time employees breaches section 68. Clauses become a part of a collective agreement as a result of demands by parties and, ultimately, agreement to their inclusion. It may well be that a just cause clause applicable to part-time employees would not have been demanded by Local 938 in bargaining because the full-time portion of the unit did not think it necessary or, even if demanded, the whole bargaining unit would not be willing to support it in the face of employer resistance or trade its acceptance for some other demand. We therefore cannot conclude that because a just cause clause was not negotiated for part-time employees, that *ipso facto* this was a breach of section 68. To do so would be to set in the abstract certain minimum conditions which must be negotiated for a bargaining unit by its bargaining agent. This is a part we are not prepared to take in these circumstances.

(see also the cases cited therein)

A union is free to negotiate different terms governing different classes of employees provided that the union weighs the competing interests of the employees it represents and makes a considered judgement, the procedure and result of which must be neither arbitrary, discriminatory, nor in bad faith: *Dufferin Aggregates*, [1982] OLRB Rep. Jan 35. In this vein, the Board notes that provisions denying just cause discharge protection to probationary employees are a feature common to many collective agreements. Such provisions reflect the legitimate employer interest in assessing the skills and abilities of prospective employees prior to their attaining seniority and the correlative benefits and protections. There is no evidence in this case to indicate that section 9.01 was unfairly negotiated, and accordingly, this aspect of the complaint cannot succeed.

8. The above reasoning is not dispositive of the complaint, however, as what the complainant seems to be alleging is not so much that the union, in negotiating the collective agreement, agreed to different substantive rights for different classes of employees, but rather that the union agreed to a provision barring access of one group of employees — probationers — to final and binding arbitration for differences arising in respect of a discharge. Whether the complainant is accorded the substantive right of just-cause discharge is a matter of interpretation of the collective agreement. If it were found that the agreement provides such right, then we take it to be clear, since the Ontario Court of Appeal decision in *Re Ontario Hydro* (1983) 147 D.L.R. (3d) 210, that the parties to a collective agreement are required to provide for the settlement of any dispute over such rights by final and binding arbitration. Where just-cause protection exists, any provisions blocking resort to arbitration to determine the right is void as contrary to section 44(1) of the Ontario *Labour Relations Act*. Section 44(2) then operates to cure the defective agreement by deeming it to contain the provision set out in that section.

9. In these circumstances, two questions arise: has the union violated its duty of fair representation in negotiating an illegal provision, notwithstanding the curative effect of section 44(2)? If not, has it breached the standard of care required in representing the complainant,



that is, in not informing him of the effect of the Court's decision in *Ontario Hydro*? Dealing first with the negotiation of section 9.01, it is important to note that the agreement in question was concluded January 1, 1983, over three months *prior to* the release of the Court's decision in *Ontario Hydro*. Therefore, even assuming that in agreeing to an illegal clause, a union could violate section 68, no violation can be made out where the union could not reasonably have known that the clause was illegal. In other circumstances, different considerations might arise, and the curative effect of section 44(2) might not avail the union. For present purposes, however, it is a sufficient answer to this claim to note that the provision was negotiated in good faith, before the Court declared that such provisions were in certain circumstances illegal.

10. As to whether the union has breached the standard of care required in representing the complainant in not informing him of the effect of *Ontario Hydro*, we note that the complainant did not claim that the union failed in its representational obligations in this respect. Nevertheless, in the interests of dealing fully with this complaint, the Board refers to its recent decision in *Smith & Stone (1982) Inc.*, [1984] OLRB Rep. Nov. 1609. The Board, in that case specifically rejected the notion that union ignorance of the Court's decision in *Ontario Hydro* of itself constituted arbitrariness and a breach of section 68. The Board said as follows:

... the fact that another legal argument or approach may have been available to the complainant does not establish a defect in the union's representation of the complainant. Certainly, Mr. Kenny's [the union rep's] position before this Board would have been stronger if he had considered the jurisdictional argument and consciously rejected it as an inferior strategy. Had he done so, absolutely no fault could have been found in his approach. However, the fact that he did not do so does not amount to evidence of a "non-caring attitude" or a "summary approach" that can be considered to be "reckless, capricious or grossly negligent". The mere fact that he was not aware of such an argument or did not discover such an argument does not amount to arbitrariness. We reach this conclusion because on the basis of the facts and the information available to Mr. Kenny and which Mr. Kenny was aware of, he considered Mrs. Hall's case carefully and put his mind to the case and made a reasonable decision as to how to best present the case to the arbitrator. He also did this in a manner which is completely consistent with the experience and level that this Board would exact from a union official in his capacity. To decide otherwise, would be to essentially second guess Mr. Kenny in retrospect with the calmness that time affords and with the advantage of having the insight into Professor Brandt's [the arbitrator's] conclusions.

11. For all of the foregoing reasons, this complaint is hereby dismissed.

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**1447-84-R** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Applicant, v. **Woodbridge Foam Corporation**, Respondent, v. Group of Employees, Objectors

**Build-up — Certification — Practice and Procedure — Firm plan to increase workforce — Union having support of over 55% of 50% of projected workforce — Certified without vote — Build-up principle not applied**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members W. H. Wightman and L. C. Collins.

**APPEARANCES:** *Lorna J. Moses, Maureen Kirincic and Brian Patrick for the applicant; Heather J. Laing, W. Grant Oliver, Fred Mathewson and Jacques Capra for the respondent; no one appearing for the objectors.*

**DECISION OF THE BOARD;** January 10, 1985

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. On the first day scheduled for hearing, the parties were not agreed on the bargaining unit description, including whether the quality control technicians, the process engineering technicians and a clerical employee (the shipping clerk) should be excluded from the bargaining unit, as contended by the respondent, or included in the bargaining unit, as submitted by the applicant. The Board heard evidence regarding the duties and responsibilities of employees in these classifications.
4. On the day scheduled for continuation of the hearing, however, the parties met with a Board Officer and fully resolved their disagreement with respect to the bargaining unit description.
5. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the Town of Tilbury, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

**CLARITY NOTE:** For purposes of clarity, as agreed by the parties, the material control clerk and the shipping clerk are excluded from the bargaining unit as clerical staff. Also, for the purposes of clarity and as agreed by the parties, process engineers (i.e., professional engineers) are excluded from the bargaining unit.

6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 13, 1984, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1)

of the said Act. In fact, the membership count is 86 employees out of 114 in the bargaining unit.

7. Three statements of desire were filed with the Board containing a total of 10 names, none of which coincide with the names of those who signed membership cards. Accordingly, the Board finds the statements of desire not relevant because, even if voluntary, they would not raise doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, that the Board would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time.

8. Notwithstanding the fact that the applicant has met the statutory requirements for automatic certification, the Board retains a discretion under section 7(2) of the Act to direct the taking of a representation vote. The respondent submits that this is an appropriate case in which to direct such a vote on the ground that there is a projected buildup in the number of employees in the bargaining unit.

9. The respondent called one witness with respect to the projected buildup of the work force, Jacques Capra, vice-president, manufacturing, at the Tilbury plant. The applicant called no witnesses. In view of that uncontradicted evidence, the Board makes the following findings of fact.

10. The respondent company manufactures urethane foam products primarily for the furniture industry, athletics industry and the automotive industry. In the automotive industry, customers include the major manufacturers (e.g., GM, Ford, Chrysler, Volkswagen and International Harvester). The customers request bids based on drawings of the products needed and issue purchase orders to the successful bidder in the anticipated volume for each unit. The supplier is responsible for producing the tooling (moulds) in sufficient quantity to fill the order by the relevant deadlines. Purchase orders are issued well in advance of the model year. That is, the great majority of orders in respect of the 1985 model year have already been placed, suppliers are currently bidding on orders in respect of the 1986, 1987 and even 1988 models.

11. At the Tilbury plant, construction started in May, 1983 and production began in late September, 1983. Currently, there is one production line normally operating in three five-day shifts and producing car seats, cushions and backs. In the past three or four weeks, due to an expected increase in plant capacity, a weekend operation of two twelve-hour shifts has been added.

12. The company purchased the Tilbury site with a view to possible expansion and erected the first building in such a way as to allow expansion on the remaining land. In spring 1984, the company was reasonably certain added capacity would be needed for the 1985 model year production. Thus, the warehousing portion of the expansion was started at that time and completed this past summer. More recently, construction for the production end of the project was commenced. At present, the section of the floor for the production line has already been poured, the roof is scheduled for completion within a week and the walls within two weeks. Delivery of equipment has started. The building is scheduled to be ready for production in late January, 1985. The capital costs of the second production line, including the building, are about \$3 million.



13. Without going into exhaustive detail, the second production line would manufacture substantially the same product. The differences in design of the 1986 model year, however, would result in a need for more staff to maintain the same volume of output. The equipment to be used in the second line is substantially similar to that in the first line. Further, the job classifications on both lines would be the same or substantially the same.

14. The second production line would require 130 employees to handle a five-day three-shift operation. The second line is scheduled to start at the end of January, 1985. Sixty employees would be required to start this line. The line would not start with only one shift; at least two, if not all three, would be needed. Initially, "samples" would be produced for the customers to conduct testing, measurement and trimming. Then, output would increase to manufacture the parts as needed as the 1986 model year cars themselves were produced. The timing of this increase is not precisely predictable as customers' deadlines could be shifted somewhat. However, by mid-1985, car production would be in full swing and, thus, the production at Tilbury would have to be slightly earlier.

15. Of the sixty employees, approximately thirty comprised the employees recently hired for the "weekend" operation. That is, the company expected and informed these employees when they were hired in October, 1984 that they would form the core of the new line and could expect a normal forty-hour week schedule in January. The company has not, however, asked for a commitment by these employees to accept the full-time positions in January, 1985. Thus, the second line would start with 60 at the end of January, 1985 and rise in regular increments thereafter until the full complement of 130 is reached in July.

16. The company is committed to the expansion; there have been public statements by the company about the expansion. Firm orders have been received for the 1986 model year. In fact, the total capacity of the second production line is committed in order to fill these firm orders. If there was a dip or decline in the market for 1986 model year cars, this would not appear until the fall of 1985 and, consequently, there would be no impact on the projected expansion. That is, the expansion has to proceed as planned to fulfill the firm orders.

17. Counsel for the respondent argued that the usual conditions were present to warrant an exercise of the Board's discretion to order a representation vote deferred until a representative segment of the plant work force was in place. *Atlantic Packaging Products*, [1980] OLRB Rep. Feb. 158 was referred to in support. Specifically, the number of employees at the time of the certification application (i.e. August, 1984) was less than 50%, namely, 114 employees, whereas another 130 would be hired. Counsel also argued that the 114 was actually an inflated figure because of the Board's classification of employees working more than twenty-four hours per week as full-time, i.e., not all 114 were working the "normal" full-time shift at the plant. Secondly, the planned build-up (thirteen months by mid-summer 1985) should be considered reasonable. In the alternative, it was submitted the representation vote should be held at the end of January when the second production line would be in place. Thirdly, the buildup is not dependent on factors outside the employer's control, i.e., the orders are firm, construction and training of employees to run the second line are well underway, etc. A dip in the demand for the product would not affect the plant, even assuming such a market decline occurred (and it was asserted there was no evidence warranting such an assumption) would not affect the employees at the Tilbury plant until after the projected buildup had occurred. Finally, counsel submitted that for the Board to certify the applicant on the ground that it had over 55% membership support of less than 50% of the planned work force would "force" these new

employees into a collective bargaining relationship and put unnecessary stress on that relationship.

18. Counsel for the applicant submitted that the Board should not order a representation vote in the circumstances. Firstly, the applicant had the support of 75% of employees in the bargaining unit. Secondly, all classifications were presently represented, i.e., the buildup really involved duplication of the current classifications. Expansions generally do not happen on schedule and, in the current case, deferring determination of the certification issue from the application date on August 31, 1984 to the date the buildup is scheduled for completion, namely, mid-summer of 1985, was not warranted in view of the level of membership support presently enjoyed by the applicant. Counsel referred to *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 846. In balancing the interests of the two groups of employees (the current and projected employees), it was argued that the existing group of employees was sufficiently representative, particularly in light of the level of union support, to warrant immediate certification.

19. Both counsel made submissions as to the number of employees actually in the bargaining unit at the relevant time. For example, counsel for the respondent argued that the number included some persons who really were "part-timers" but fell within the Board's definition of full-time employees. Thus, the figure 114 was inflated and the percentage of the work force currently in place thereby correspondingly reduced. Counsel for the applicant contended that the 114 included some employees who were working the special weekend shift and slated to "transfer" to the second production line in January. That is, the projected buildup was actually closer to 115 or 100 than 130. In consequence, it was submitted that the current work force did not comprise at least 50% of the total.

20. In the Board's view, the Board is confined to the actual numbers accepted by the parties with respect to the count, i.e., 86 union members of 114 employees in the bargaining unit. The Board cannot consider these numbers "adjustable", up or down. Further, with respect to the projected buildup, the Board is confined to the evidence heard by the Board as to when the weekend shift was added and how many employees are projected over the period of the buildup. That uncontradicted evidence, once again, is that the weekend shift of thirty employees, the planned core of the sixty needed to start the second production line, was hired in October, i.e., after the certification application date.

21. A useful exposition of the Board approach to buildup is found in the following passage from *Marley Roof Tiles Limited*, [1984] OLRB Rep. March 511.

8. In cases involving a projected build-up in employees, the Board seeks to balance the right of persons presently employed to collective bargaining against the right of future employees to select a bargaining agent of their own choice. As the Board noted in the *Canadian Cannery Limited* case 57 CLLC ¶ 18,056 a refusal to certify immediately tends to deprive the current employees of their right to collective bargaining, including the right to engage in legal strike activity. However, immediate certification will prevent future employees from having input into selecting a bargaining agent (or deciding not to be represented at all) for some period of time due to the provisions in the Act relating to the displacement and termination of bargaining rights.

9. The Board surveyed the criteria it has applied in trying to balance the interests of the two groups in *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846 at pp. 847-848:

“Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. Firstly, the Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls* [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.* [1972] OLRB Rep. Nov. 988, and *Canron* [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent’s industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.* (*supra*), where the projected build-up was dependent on the next year’s market and competitive conditions. Secondly, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment* [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. Thirdly, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.) Fourthly, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, (*supra*) and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)”

10. In applying the criteria referred to above, the Board generally does not take into account normal fluctuations in a company’s work force arising out of the cyclical nature of the particular business in which it is engaged. In this regard see *Filkon Food Services Limited* [1981] OLRB Rep. May 1771, where in rejecting the argument that a projected influx of summer students into a bargaining unit involved a build-up such that the Board should delay consideration of a certification application, the Board made the following comments:



“...the Board’s sole concern is whether the employee complement at the time of an application for certification is ‘representative’ of the full complement on an ongoing basis (see e.g. *Atlantic Packaging*, [1980] OLRB Rep. Feb. 158, paragraphs 8 and 9). What the respondent is relying upon in this case is a purely seasonal fluctuation in its work force, involving the increased use of students in the summer. The Board has never held that an application for certification which includes summer students must be brought in the summer. More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either ‘build-up’ or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.* [1976] OLRB Rep. May 215). The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on ‘seasonal’ basis.”

22. The Board has found in the instant case, that the respondent has a firm plan for a buildup of the work force which is not dependent upon external market factors beyond the control of the employer. Any decline for the product of the Tilbury second production line would not have an impact until some months after the projected buildup would be completed. The period of time involved is within the time frame accepted by the Board in these cases, albeit toward the upper end of that range. Moreover, the second production line would at least substantially duplicate the classifications of current employees.

23. The Board must, however, consider whether the existing group of employees is representative of the projected work force. The current complement of 114 employees is slightly less than 50% of the projected total of 244 (i.e. 114 plus 130). As indicated in *F. Lepper & Son Ltd.*, *supra*, the Board usually takes the position that fifty per cent of the expected total number of employees is sufficiently representative. From a purely arithmetic perspective, this position would be reached when the 122nd employee was hired.

24. In *Marley Roof Tiles*, *supra*, the Board found that, when the fifty per cent point was reached in that case, it was reasonable to conclude, given the level of union support at the time of application, the applicant would retain support in excess of fifty-five per cent of the bargaining unit. Accordingly, the Board decided that the current employees were sufficiently representative for the purposes of that application. The Board refused to direct a representation vote.

25. The instant case, though, does not neatly fit into the approach in *Marley Roof Tiles Limited*, *supra*. The current level of union support is considerable, i.e. 86 of 114 employees or 75%. At the arithmetical half-way mark, the 122nd employee, the local union support drops to 70%. This calculation makes the same assumptions as in the *Marley* case as to the retention of current employee support and makes no predictions as to additional union support from current or new employees. On the facts, the second production line would consist of sixty employees. However, of those sixty, thirty have already been hired (i.e., in October, after the application date), first to work on the weekend shift, but expressly to form the core of the second production line. The Board, then, considers that this group of thirty should be added to the

current total of employees and the support of the union measured against the complement of 144 employees. On this analysis, the level of union support is 59% when over 50% (in fact close to 60%) of the projected work force is present.

26. The respondent argued that 55% support by 50% of the projected work force was not a firm foundation for collective bargaining, for forcing new employees to accept a bargaining agent which they had no part in choosing. The Board does not intend to turn this into an arithmetical exercise, although the Board would note that the level of union support is above 55% even when almost 60% of the work force is on board. As stated earlier, the Board must balance the right to collective bargaining of current employees against the right of future employees to participate in the selection of a bargaining agent. In this case, despite the fact that the respondent has satisfied several of the relevant criteria, the Board considers that the applicant has sufficient support among a representative work force to warrant certification without delay or the taking of a representation vote.

27. The Board would add a final comment on the respondent's position that 55% support by 50% of the projected work force is an insufficient measure given the realities of collective bargaining relationships. Firstly, the Board notes that even the arithmetical exercise utilized by the Board in calculating the level of union support held that support at the current figure. That is, the calculation made the assumption that support for the union would not grow along with the buildup in employee numbers. It is because this assumption is just that — an assumption — that the Board is reluctant to view 55% of 50% as an unreasonably low or impractical standard. Secondly, if support for the union does not grow along with the planned buildup, there will come a point at which the disaffected employees can seek termination of the union's bargaining rights. The majority of employees at that time will determine whether the union will continue to hold bargaining rights for the bargaining unit. Thus, the decision not to postpone certification and order a representation vote does *not* irrevocably force upon future employees a collective bargaining agent in whose selection they did not participate. While it may be argued that it is difficult for unhappy employees to extricate themselves from representation by an unwanted bargaining agent, this must be balanced by the wishes of the current employees for representation by that bargaining agent. The Board must weigh the factors in each case but, included among those factors, is the actual level of support enjoyed by the union.

28. For the foregoing reasons, then, the Board is not prepared to direct a representation vote or postpone certification of the applicant. Accordingly, a certificate will issue to the applicant.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1984

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**2672-83-R:** The Canadian Union of Public Employees, (Applicant) v. Willows Estate Nursing Home, (Respondent).

Unit: "all employees of the respondent in Aurora, Ontario, save and except Registered Nurses, Graduate Nurses, Supervisors and persons above the rank of Supervisor." (49 employees in unit). (*Clarity Note*).

**0631-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Cornwall Gravel Company Limited, (Respondent).

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1259-84-R:** Local #1 Ontario — International Union of Bricklayers' & Allied Craftsmen, (Applicant) v. Quorum Inc., (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**1704-84-R:** Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cornelius Manufacturing Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, clerical, office, sales and technical staff." (97 employees in unit).

**1937-84-R:** United Steelworkers of America, (Applicant) Alumabrite Anodizing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1961-84-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. William Nelson Limited, (Respondent).

Unit: "all employees of the respondent at Georgetown, Ontario, save and except supervisors and managers, persons above the rank of supervisor and manager, office, clerical, sales staff and persons covered by subsisting collective agreements." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1970-84-R:** Office and Professional Employees International Union, (Applicant) v. Caisse Populaire de Kapuskasing Limitee, (Respondent).

Unit #1: "all employees of the respondent in the Towns of Kapuskasing and Smooth Rock Falls and the Townships of Moonbeam, Opasatika, Fauquier and Val Rita, save and except Accountant/Office Manager, Assistant Loan Manager and Branch Manager and persons above the rank of Accountant/Office Manager, Assistant Loan Manager and Branch Manager, Data Processing Technicians, Executive Secretary to the General Manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative training program." (32 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Towns of Kapuskasing and Smooth Rocks Falls and the Townships of Moonbeam, Opasatika, Fauquier and Val Rita regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Accountant/Office Manger, Assistant Loan Manager, Branch Manager and persons above the rank of Accountant/Office Manager, Assistant Loan Manager, and Branch Manager, Data Processing Technicians, Executive Secretary to the General Manager and students employed on a co-operative training program." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2108-84-R:** United Electrical, Radio and Machine Workers of Canada (UE), (Applicant) v. Keene Corporation, (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except foremen, those above the rank of foreman, office, sales and engineering staff and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

**2134-84-R:** Canadian Textile and Chemical Union, (Applicant) v. Di Marcantonio Industries Inc., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth save and except office and sales staff, supervisors, foremen, foreladies, and persons above the rank of foreman and forelady, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (88 employees in unit). (*Having regard to the agreement of the parties*).

**2163-84-R:** Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Skene Cartage Company Limited, (Respondent).

Unit: “all employees of the respondent at its warehouse in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week, save and except foremen, persons above the rank of foreman, office and sales staff.” (30 employees in unit). (*Having regard to the agreement of the parties*).

**2193-84-R:** Canadian Textile & Chemical Union, (Applicant) v. Union Felt Products (Ontario) Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed on a co-operative work program with colleges and universities.” (89 employees in unit). (*Having regard to the agreement of the parties*).

**2197-84-R:** Christian Labour Association of Canada, (Applicant) v. W. L. McDace Ltd., (Respondent).

Unit: “all construction labourers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**2200-84-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Vector Construction Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**2202-84-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Good’s Butcher Shop Limited, (Respondent).

Unit: “all employees of Good’s Butcher Shop Limited at Vineland, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**2215-84-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. R.T.S. Carpentry Inc., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

**2240-84-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Houle Printing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in its Community Web Printing Division at Tilbury, save and



except foremen, persons above the rank of foreman, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (26 employees in unit).

**2278-84-R:** United Food & Commercial Workers International Union, Local 175, (Applicant) v. Marks & Spencer Canada Inc., (Respondent).

Unit: “all employees of the respondent at its Peoples Division in Donville, Ontario, save and except assistant manager, persons above the rank of assistant manager and the secretary to the manager.” (12 employees in unit). (*Having regard to the agreement of the parties*).

**2280-84-R:** Ironworkers District Council of Ontario, (Applicant) v. Cansteel Structural Company (a division of 293599 Ontario Inc.), (Respondent).

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**2288-84-R:** Ontario Nurses’ Association, (Applicant) v. St. Joseph’s Home, (Respondent).

Unit: “all lay registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by the respondent in Guelph, save and except nursing co-ordinator, and persons above the rank of nursing co-ordinator.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**2299-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. Kwi-Towers, a Division of Kott-Warnecke Inc., (Respondent).

Unit #1: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**2307-84-R:** The Ontario Public Service Employees Union, (Applicant) v. The Geneva Centre for Autism, Communication and Language Disorders, (Respondent).

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except directors, persons above the rank of director, coordinator of office management, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (11 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week, and students in the Municipality of Metropolitan Toronto, save and except directors, persons above the rank of director, and coordinator of office management.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2312-84-R:** Christian Labour Association of Canada, (Applicant) v. Mount Forest Nursing Home Limited, (Respondent).

Unit: “all employees of the respondent at its nursing home in Mount Forest, save and except registered

and graduate nurses, supervisors, persons above the rank of supervisor, activity director, office and clerical staff.” (61 employees in unit). (*Having regard to the agreement of the parties*).

**2322-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. G & F Excavating Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2330-84-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Hostess Food Products Limited, (Respondent).

Unit: “all employees of the respondent at Stoney Creek save and except sales supervisor and persons above the rank of sales supervisor.” (21 employees in unit). (*Having regard to the agreement of the parties*).

**2344-84-R:** Christian Labour Association of Canada, (Applicant) v. Niagara Ina Grafton Gage Home of the United Church of Canada, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at St. Catharines, Ontario, save and except administrators, office staff, activity director, department supervisors and persons above the rank of department supervisor.” (18 employees in unit). (*Having regard to the agreement of the parties*).

**2346-84-R:** Ontario Public Service Employees Union, (Applicant) v. Kapuskasing Regional Children and Youth Development Centre, Centre de Developement De L’Enfant Et De La Jeunesse, (Respondent).

Unit: “all employees of the respondent at Kapuskasing, save and except, supervisors, persons above the rank of supervisor, secretary/receptionist, persons employed for not more than twenty-four (24) hours per week and students employed for the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2347-84-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Linwell Wood Products Limited, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2350-84-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Alvac Limited, (Respondent).

Unit: "all employees of the respondent in the town of Newcastle, Ontario, save and except forepersons, persons above the rank of forepersons, office and sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

**2354-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Star Excavating & Grading Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2362-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666, (Applicant) v. City Heating Company, (Respondent).

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2363-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666, on its own behalf and on behalf of the affiliated Bargaining Agents of the Employee Bargaining Agency, (Applicant) v. Allan Leslie Stewart, carrying on business under the firm name and style of Standard Plumbing, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all plumbers' plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2371-84-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Heritage Renovations and Design Ltd., (Respondent).

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in unit).

Unit #2: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save



and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2379-84-R:** Ontario Nurses Association, (Applicant) v. The Corporation of the County of Bruce Gateway Haven, Home for the Aged, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Wiarton, save and except Director of Nursing, and persons above the rank of Director of Nursing.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2410-84-R:** Canadian Union of Public Employees, (Applicant) v. Laurier Manor Limited, (Respondent).

Unit: “all employees of the respondent at Ottawa, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, office staff, maintenance supervisor, dietary supervisor, recreologist, department heads, persons above the rank of department head, and persons covered by a subsisting collective agreement.” (41 employees in unit). (*Having regard to the agreement of the parties*).

**2411-84-R:** Union of Bank Employees Local 2104 (Ontario) C.L.C., (Applicant) v. Brant Community Credit Union Limited, (Respondent).

Unit: “all employees of the respondent in Paris, save and except managers and persons above the rank of manager.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**2417-84-R:** Ontario Nurses’ Association, (Applicant) v. Garson Manor Nursing Home, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Nickel Centre, Ontario, save and except the Administrator and persons above the rank of Administrator.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2418-84-R:** United Plant Guard Workers of America, Local 1962, (Applicant) v. General Motors of Canada Limited, (Respondent).

Unit: “all security guards employed by the respondent, at its Diesel Division, in the City of London, Ontario, save and except sergeants, persons above the rank of sergeant, receptionists, office and clerical staff, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and students covered by subsisting collective agreements.” (22 employees in unit). (*Having regard to the agreement of the parties*).

**2464-84-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Jaslow Glass Industries Ltd. (c.o.b. Artistic Lighting), (Respondent).

Unit: “all employees of the respondent in Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (21 employees in unit).

**2494-84-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. DuBois Chemicals of Canada Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons covered by subsisting collective agreements.” (2 employees in unit).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**1953-84-R:** Ontario Public Service Employees Union, (Applicant) v. Ongwanada Hospital, (Respondent).

Unit: "all employees of Ongwanada Hospital, Penrose Division, of Kingston, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, and persons covered by subsisting collective agreements." (66 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		66
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		10

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**1294-84-R:** The Employees' Association of K-Mart Canada, (Applicant) v. K-Mart Canada Limited, (Respondent) v. Teamsters Local Union. No. 419, (Intervener).

Unit: "all employees of the respondent at its distribution centre in Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (43 employees in unit).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		35
Number of spoiled ballots		1
Number of ballots marked in favour of intervener		5

**1761-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Parking Authority of Toronto, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students, save and except supervisors, field auditors, persons above the rank of supervisor or field auditor, office staff and persons covered by subsisting collective agreements." (68 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		67
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		12
Ballots segregated and not counted		1

**1854-84-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Ventra Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Chatham, save and except foremen, persons above the rank of foreman, materials manager, manufacturing engineers, quality control manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	39	
Number of segregated ballots cast by persons whose names do not appear on voters' list		2
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		16
Ballots segregated and not counted		2

**2009-84-R:** Canadian Union of Public Employees, (Applicant) v. Domus Building Cleaning Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at the Ottawa General Hospital, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (77 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		79
Number of persons who cast ballots	76	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		48
Number of ballots marked against applicant		27

### Applications for Certification Dismissed — No Vote Conducted

**1325-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Kermecho Co. Limited, (Respondent). (8 employees in unit).

**1646-84-R:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U.S. and Canada Local 924, (Applicant) v. The Stratford Shakespearean Festival Foundation of Canada, (Respondent). (27 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0437-84-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Canada's Capital Building Services Limited, (Respondent).

Unit: "all employees of the respondent at the Lester B. Pearson International Airport, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (244 employees in unit).

Number of names of persons on list as originally prepared by employer		207
Number of persons who cast ballots		158
Number of spoiled ballots		7
Number of ballots marked in favour of applicant		65
Number of ballots marked against applicant		82
Ballots segregated and not counted		4

**1747-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at its retail stores in the Town of Oakville regularly employed



for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except Department Supervisors, persons above the rank of Department Supervisor, security staff, management trainees, office and clerical staff, students employed on a co-operative programme with a school, college or university, and all employees of HBC Travel Limited.” (138 employees in unit).

Number of names of persons on revised voters' list		134
Number of persons who cast ballots	84	
Number of ballots marked in favour of applicant		42
Number of ballots marked against applicant		42
Ballots segregated and not counted		14

**1856-84-R:** Energy and Chemical Workers Union, CLC, (Applicant) v. Indusmin Limited, (Respondent) v. United Cement, Lime Gypsum and Allied Workers International Union, (Intervener #1) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Intervener #2).

Unit: “all employees of the respondent in its construction materials division in the town of Halton Hills, the Township of Vaughan and Metropolitan Toronto, all in the province of Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff and watchmen and persons covered by subsisting labour agreements.” (52 employees in unit).

Number of names of persons on list as originally prepared by employer		51
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		36

**2025-84-R:** Canadian Union of Public Employees, (Applicant) v. St. Francis Memorial Hospital, (Respondent).

Unit: “all employees of the respondent at Barry’s Bay, save and except professional medical staff; registered, graduate and undergraduate nurses; supervisors; chief laboratory technologist; chief radiology technologist; persons above the rank of supervisor, chief laboratory technologist, and chief radiology technologist; and the secretary to the administrator.” (71 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		69
Number of persons who cast ballots	57	
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		32

**2110-84-R:** International Ladies’ Garment Workers’ Union, (Applicant) v. Weston Apparel Manufacturing Company, Division of Dylex Limited, (Respondent) v. Amalgamated Clothing & Textile Workers Union Toronto Joint Board, (Intervener).

Unit: “all employees of the respondent employed at 965 Weston Road in the Municipality of Metropolitan Toronto save and except shipping, receiving, warehouse and maintenance employees, foremen, foreladies, persons above the rank of foreman or forelady, designers, office staff and sales staff.” (548 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		557
Number of persons who cast ballots	522	
Number of spoiled ballots		7
Number of ballots marked in favour of applicant		164
Number of ballots marked in favour of intervener		350
Number of ballots segregated and not counted		1

**2130-84-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ontario Banknote Ltd., (Respondent) v. Toronto Typographical Union, Local 91 (ITU), (Intervener).

Unit: "all employees of the respondent at its plants in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students during the school vacation period." (52 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	49	
Number of spoiled ballots		3
Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	49	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		12
Number of ballots marked in favour of intervener		34

#### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1079-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Disabled and Aged Regional Transit System, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth save and except dispatchers, manager, persons above the rank of manager and persons covered by a subsisting collective agreement." (8 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		2

**1954-84-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical, and technical employees of the respondent at its heavy goods distribution center, 100 Metropolitan Road, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to the general manager, secretary to the personnel manager, time-keeper, alternate time-keeper, security staff, drivers and vehicle fleet maintenance personnel, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college, or university and persons covered by previous certificates issued by the Board in respect of this location." (50 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		46
Number of persons who cast ballots	43	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		25

**2045-84-R:** Energy and Chemical Workers Union, (Applicant) v. Provincial Gas Company, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and sales employees of the respondent in the Regional Municipality of Niagara, save and except Supervisors, persons above the rank of Supervisor, Inspectors, Engineers, Residential Commercial, and Industrial Sales Representatives, Stenographers and Secretaries working for the District Manager or persons above the rank of District Manager, Personnel Stenographer, persons employed at Grimsby Gas, persons covered by a subsisting Collective Agreement between the Company and the Energy and Chemical Workers Union, Local 517, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period or in a co-operative training program." (82 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		83
Number of persons who cast ballots	77	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		43

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1729-84-R:** Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. W. A. Stephenson Construction (International) Limited, (Respondents).

**2242-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Durham Board of Education, (Respondent).

**2256-84-R:** United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. D. T. Drywall Ltd., (Respondent).

**2257-84-R:** United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. Mickey-Clair Drywall Limited, (Respondent).

**2345-84-R:** Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261, (Applicant) v. 595578 Ontario Ltd. c.o.b. as Sandwich N'Such, (Respondent).

**2359-84-R:** United Steelworkers of America, (Applicant) v. Meg Trap Inc., (Respondent).

**2364-84-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Pacific Northern Rail Contractors Corp., (Respondent).

**2428-84-R:** Canadian Union of Operating Engineers and General Workers, Local 101, (Applicant) v. Harding Carpets Limited, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1102-84-R:** International Union of Elevator Constructors, and its Local 50, (Applicant) v. F & H Elevator Services Limited and Northern Services Du Nord Limited, (Respondents). (*Dismissed*).

**1218-84-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Prime Energy Systems (1981) Limited, Prime Energy Systems (Ontario) Limited and Prime Energy Systems Limited, (Respondent). (*Granted*)

**1814-84-R:** Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United



Brotherhood of Carpenters and Joiners of America, (Applicant) v. W. A. Stephenson Construction Co. Limited and W. A. Stephenson Construction (International) Limited, (Respondents). (*Withdrawn*).

**2295-84-R:** Ballycliffe Lodge Limited, (Applicant) v. Her Majesty The Queen in Right of Ontario, (Respondent). (*Dismissed*).

## SALE OF A BUSINESS

**0837-84-R:** Canadian Union of Public Employees, Local 2553, (Applicant) v. Villa Colombo Homes for the Aged Inc. and Modern Building Cleaning, (Respondents). (*Withdrawn*).

**1180-84-R:** The Canadian Union of Public Employees and its Local 504 (Peterborough Civic Employees Union), (Applicant) v. The Corporation of the City of Peterborough, (Respondent) v. Amalgamated Transit Union, Division 1320, (Intervener). (*Dismissed*).

**1219-84-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Prime Energy Systems (1981) Limited, Prime Energy Systems (Ontario) Limited and Prime Energy Systems Limited, (Respondent). (*Granted*).

**1466-84-R:** International Brotherhood of Painters and Allied Trades, Local Union 1904, (Applicant) v. Viktor Zauner, c.o.b. as Certified Master Painting and Malermeister Painting Ltd., (Respondent). (*Dismissed*).

**1888-84-R:** International Beverage Dispensers and Bartenders Union, Local 280, (Applicant) v. The Last Resort Hotel, Inc carrying on business as Doyles Tavern, (Respondent). (*Granted*).

**2048-84-R:** Labourers International Union of North America, Local 1059, (Applicant) v. XDG Limited, Carl DeWilde Contracting Ltd. and/or Carl DeWilde c.o.b. as Carl DeWilde Contracting Kilbyrne Investments Inc., (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0842-84-R:** Ann Cooper, Jill Hulton, Judy Hanlon, Karen Schwarz, (Applicants) v. Kingston Township Professional Fire Fighters Association, (Respondent). (8 employees in unit). (*Dismissed*).

**1612-84-R:** Eric Thompson, (Applicant) v. Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Respondent) v. Volcano Inc., (Intervener).

Unit: "all burner mechanics and apprentices, certified welders and apprentices in the employ of Volcano Inc. in its office at Ottawa, save and except non-working foremen and persons above the rank of non-working foremen." (5 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

**1613-84-R:** Iain Loveman, (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Respondent) v. K. P. Bronze Co. Ltd., (Respondent).

Unit: "all employees of K. P. Bronze Co. Ltd. in Aurora, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff, draftsmen, watchmen, guards, persons engaged in field erection work, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (17 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		15

**1625-84-R:** Joan E. Palmer, James Cove, Audrey Harvey, Henry Kuipers, Mark J. Southern, Barry Lebow, Larry Ferguson, (Applicants) v. United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicants) v. United Food and Commercial Workers International Union, AFL-CIO-CLC, (Respondent) v. Carrying Industries Ltd., (Intervener).

Unit: "all employees of Carrying Industries Ltd. at Trenton, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (9 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		9

**1688-84-R:** Gary Dennis on his own behalf and on behalf of all other employees of North York General Hospital, (Applicant) v. Canadian Union of Public Employees, Local 1692, (Respondent) v. North York General Hospital, (Intervener).

Unit: "all employees of the North York General Hospital at the City of North York, save and except foreperson, persons above the rank of foreperson, professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the North York General Hospital and the International Union of Operating Engineers, Local 796." (291 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		287
Number of persons who cast ballots	198	
Number of ballots marked in favour of respondent		66
Number of ballots marked against respondent		132

**1966-84-R:** Helene Bergeron and Lucille Dubois, (Applicants) v. Canadian Union of Public Employees, (Respondent) v. United Counties of Prescott and Russell, (Intervener). (24 employees in unit). (*Dismissed*).

**1967-84-R:** Mary M.M. Daley, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. United Counties of Prescott and Russell, (Intervener). (24 employees in unit). (*Dismissed*).

**2043-84-R:** The Corporation of the United Counties of Prescott and Russell, (Applicant) v. Canadian Union of Public Employees, (Respondent). (22 employees in unit). (*Withdrawn*).

**2097-84-R:** Mark D. Savory & Kenneth F. J. Savory, (Applicants) v. Christian Labour Association of Canada, (Respondent) v. Savory Electric Ltd., (Employer). (3 employees in unit). (*Dismissed*).

**2148-84-R:** Thelma M. Murphy, Jean Duff, Madeleine Egri, Raymond Thompsett, John R. Fisher, (Applicants) v. Service Employees Union, Local 204, (Respondent) v. Toronto East General Hospital Dextoxification Unit, (Intervener). (8 employees in unit). (*Dismissed*).

**2290-84-R:** Arthur Rea, (Applicant) v. The Canadian Guards Association Local 114, (Respondent) v. Pinkerton's of Canada Ltd., (Intervener). (60 employees in unit). (*Dismissed*).

**2291-84-R:** Doris Wilson et al, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Local 173-1, (Respondent). (13 employees in unit). (*Withdrawn*).

**2356-84-R:** Charles Newlove, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Curtis Property Management Ltd., (Intervener). (2 employees in unit). (*Granted*).

**2378-84-R:** Aluminum, Brick and Glass Workers, Local 259G-A Margaret Magyar, (Applicant) v. Aluminum, Brick and Glass Workers — International Union William E. Steep, International Representative, (Respondent). (1 employees in unit). (*Withdrawn*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**0139-84-M:** Humber Memorial Hospital Association, (Employer) v. Ontario Nurses' Association, (Trade Union). (*Dismissed*).

**0140-84-M:** Sudbury General Hospital of the Immaculate Heart of Mary, (Employer) v. Canadian Union of Public Employees and its Local 1023 — C.L.C., (Trade Union). (*Dismissed*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2450-84-U:** Toronto Transit Commission, (Applicant) v. Amalgamated Transit Union, Local 113, A. E. Bolen, R. G. Clatworthy, W. A. Hughes, K. N. Killam, R. LeBlanc, D. T. McCann, W. Moreau, L. A. Trotter, Art Patrick, Paul McLaughlin and Larry Kinnear, (Respondents). (*Granted*).

**2642-84-U:** Boise Cascade Canada Limited, and Commonwealth Construction Company Limited, (Applicants) v. International Association of Machinists, Lodge 771, The International Brotherhood of Electrical Workers, Local 1744, Robert Pollard, Rod Savage, Doug Langtry, (Respondents). (*Granted*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1962-83-U:** Michael Franey, Raymond Power, (Complainants) v. Labourers' Local 597, (Respondent). (*Withdrawn*).

**2826-83-U:** Brian Kinnon, (Complainant) v. Dominion Stores Limited, and Retail, Wholesale and Department Store Union, Local 414, (Respondents). (*Dismissed*).

**2898-83-U:** Gerald T. Wilkes, (Complainant) v. Bruno A. Teichmann, Ben Loughlin, Teamsters Local Union #230, (Respondents). (*Dismissed*).



- 0134-84-U:** Fatehally Khamisa, (Complainant) v. Captall Investments Limited, (Respondent). (*Dismissed*).
- 0281-84-U:** Brian Kinnon, (Complainant) v. Dominion Stores Limited, and Retail, Wholesale and Department Store Union, Local 414, (Respondents). (*Dismissed*).
- 0319-84-U:** International Leather Goods, Plastics and Novelty Workers' Union, Local 8, (Complainant) v. Bradley-Fenn Enterprises Inc., (Respondent). (*Withdrawn*).
- 0334-84-U:** Canadian Union of Public Employees, Local 2553, (Complainant) v. Villa Colombo Homes for the Aged Inc. and Italian Canadian Benevolent Corporation and Modern Building Cleaning, (Respondents). (*Withdrawn*).
- 0703-84-U:** Ms. Kamalijit Shergill, (Complainant) v. Local 310, Amalgamated Clothing and Textile Workers Union (Shoe Division), (Respondent) v. Greb Industries, A Division of Warrington Inc, (Intervener). (*Dismissed*).
- 0851-84-U:** International Union of Operating Engineers, Local 793, (Complainant) v. Smiths Construction Company Arnprior Limited, (Respondent). (*Withdrawn*).
- 0907-84-U:** Association of Professional Student Services Personnel, (Complainant) v. The Board of Education for the City of Etobicoke, (Respondent). (*Withdrawn*).
- 0965-84-U (C):** Ontario Public Service Employees Union, (Complainant) v. Participating Hospitals Listed in Schedule "A", (Respondents). (*Withdrawn*).
- 1148-84-U:** International Ladies' Garment Workers' Union, (Complainant) v. Lindzon Limited, (Respondent). (*Granted*).
- 1207-84-U:** Ronald Coulson, (Complainant) v. Retail, Commercial & Industrial Union, Local 206, and Canada Safeway Limited, (Respondents). (*Withdrawn*).
- 1526-84-U:** Ontario Nurses' Association, (Complainant) v. Edward Street Manor Nursing Home, (Respondent). (*Dismissed*).
- 1555-84-U:** International Association of Machinists Local 235, (Complainant) v. Schwarzkopf Ltd., (Respondent). (*Withdrawn*).
- 1564-84-U:** United Steelworkers of America, (Complainant) v. Shepherd Products Ltd., (Respondents). (*Withdrawn*).
- 1569-84-U:** Steven Lenkey, (Complainant) v. United Steel Workers of America: Local 2868, (Respondent) v. International Harvester Canada Limited, (Employer). (*Dismissed*).
- 1616-84-U:** Retail, Wholesale and Department Store Union, (Complainant) v. T. Eaton Company Limited and Cambridge Leaseholds Limited, (Respondents). (*Withdrawn*).
- 1774-84-U:** United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Sunsqueeze Juices Incorporated, (Respondent). (*Withdrawn*).
- 1873-84-U:** Kazik Pawlak, (Complainant) v. Tom Cope, Business representative Local Union 1151, Millwrights and Erectors, 1204 Roland Street, Thunder Bay, Ontario. P7B 5M4, (Respondent). (*Withdrawn*).

**1890-84-U:** United Garment Workers of America, Local #253, (Complainant) v. Cumberland Clothing Limited, (Respondent). (*Withdrawn*).

**1906-84-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Granted*).

**1910-84-U:** The Canadian Union of Public Employees and its Local Union 2196, (Complainant) v. The Porcupine District Children's Aid Society, (Respondent) v. The Timmins Board of Education, (Intervener). (*Withdrawn*).

**1943-84-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Joseph Anthony Fine Furniture Ltd., (Respondent). (*Withdrawn*).

**2006-84-U:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Complainant) v. Labourers' Local 183, Karl Thier Construction Limited and Penka Carpentry Ltd., (Respondents). (*Withdrawn*).

**2015-84-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Oakville Dominion Furniture Limited, (Respondent). (*Withdrawn*).

**2030-84-U:** The Canadian Union of Public Employees, (Complainant) v. The Corporation of the Town of Belle River, (Respondent). (*Withdrawn*).

**2037-84-U:** Canadian Textile & Chemical Union, (Complainant) v. Alros Products Ltd., (Respondent). (*Withdrawn*).

**2060-84-U:** United Food and Commercial Workers International Union, Local 1105, Region 18, (Complainant) v. Saville Foods Products Inc., (Respondent). (*Withdrawn*).

**2086-84-U:** International Molders & Allied Workers Union, (Complainant) v. Eberhard Hardware Manufacturing Limited, (Respondent). (*Withdrawn*).

**2087-84-U:** Local 2104 Union of Bank Employees (Ontario) C.L.C., (Complainant) v. Welland Area Civic Employees Credit Union, (Respondent). (*Withdrawn*).

**2103-84-U:** Retail, Wholesale and Department Store Union, (Complainant) v. The Ontario Motor League, (Respondent). (*Withdrawn*).

**2125-84-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Fyfe Transportation & Services Ltd., (Respondent). (*Withdrawn*).

**2132-84-U:** Service Employees' Union, Local 478, (Complainant) v. Kapuskasing and District Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

**2151-84-U:** Monty Caradonna, (Complainant) v. Van Waters & Rogers Ltd., (Respondent). (*Withdrawn*).

**2158-84-U; 2159-84-U:** Hotel Employees and Restaurant Employees Union, Local 75, (Complainant) v. Beefeater Restaurant, (Respondent). (*Withdrawn*).

**2186-84-U:** The Parking Authority of Toronto, (Complainant) v. The Metropolitan Toronto Civic Employees' Union, Local 43, and L. Kovacs, J. Mele, R. McAllister, R. Marklew and K. Ramsay, on

their own behalf and on behalf of the Metropolitan Toronto Civic Employees' Union, Local 43, (Respondents). (*Withdrawn*).

**2198-84-U:** International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. 484307 Ontario Inc. carrying on business as Carousel Inn, (Respondent). (*Withdrawn*).

**2206-84-U:** Pauline Suzanne McDonnell, (Complainant) v. Leisure World Nursing Homes Ltd., (Respondent). (*Withdrawn*).

**2219-84-U:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. McBride's Delivery Limited, (Respondent). (*Withdrawn*).

**2248-84-U:** Linda Boyce, (Complainant) v. Ontario Union of Blind and Sighted Merchants, (Respondent). (*Withdrawn*).

**2250-84-U:** Mechanical Contractors Association Ontario Mechanical Contractors Association Toronto, (Complainants) v. G & H Medical and Industrial Gas Systems (Ontario) Ltd., et al, (Respondents). (*Withdrawn*).

**2251-84-U:** Canadian Union of Public Employees, (Complainant) v. Toronto Western Hospital, (Respondent). (*Withdrawn*).

**2276-84-U:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Intex Trade and Consumer Shows Limited c.o.b. as Disedy Display, (Respondent). (*Withdrawn*).

**2283-84-U:** Canadian Union of Public Employees and its Local 2293, (Complainant) v. Corporation of the Township of West Carleton, (Respondent). (*Withdrawn*).

**2284-84-U:** Canadian Union of Public Employees and its Local 2564, (Complainant) v. Nel-Gor Castle Nursing Home, Carleton Place, Ontario, (Respondent). (*Withdrawn*).

**2296-84-U:** International Brotherhood of Firemen and Oilers, Local Union No. 101, (Complainant) v. Nabisco Brands Ltd. Consumer Foods Division, (Respondent). (*Withdrawn*).

**2336-84-U:** United Food and Commercial Workers International Union, and its Local 1178, (Complainant) v. Canadian Canners Limited, (Respondent). (*Withdrawn*).

**2338-84-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Joseph Anthony Fine Furniture Ltd., (Respondent). (*Withdrawn*).

**2353-84-U:** Amalgamated Clothing and Textile Workers Union Local 1381, (Complainant) v. Fleetwood Canada Ltd., (Respondent). (*Withdrawn*).

**2368-84-U:** Glen Van Volkenburg Member Local 264 BCTW-IU, (Complainant) v. Randy Mablesen Cheif Steward Local 264 BCTW-IU, (Respondent). (*Withdrawn*).

**2403-84-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Joseph Anthony Fine Furniture Ltd., (Respondent). (*Withdrawn*).

**2406-84-U:** Robert Armstrong, (Complainant) v. Paperap and Bag 205 Champagne Drive, Toronto, (Respondent). (*Withdrawn*).



**2434-84-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Joseph Anthony Fine Furniture Ltd., (Respondent). (*Withdrawn*).

**2503-84-U:** United Food and Commercial Workers Union Local 175, (Complainant) v. Alvac Limited, (Respondent). (*Withdrawn*).

**2515-84-U:** W. G. Leaman, (Complainant) v. Norman LeBlanc Executive of Local 675 Toronto District Council Executive Trial Committee (LeBlanc vs. Leaman), (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**2104-84-U:** Ontario Public Service Employees Union, (Applicant) v. The Board of Governors of St. Lawrence College, William W. Cruden, President, St. Lawrence College and Bradley B. Hill, (Respondents). (*Withdrawn*).

**2175-84-U:** Ontario Public Service Employees Union, (Applicant) v. 1) Board of Governors, Northern College of Applied Arts and Technology (Haileybury School of Mines)

2) President Joseph H. Drysdale of Northern College of Applied Arts and Technology, (Haileybury School of Mines)

(3) Academic employee F.E.M. Lavigne, J. G. Thompson, Carlo Cattarello, V. R. Kunduri, R. J. Fell, T. F. Ferderber, D.S. Waugh, and J. Jerry Culhane, (Respondents). (*Withdrawn*).

**2477-84-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Joseph Anthony Fine Furniture Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

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**February 1985**



Ontario

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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

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**1744-84-M Chrisafina Alexiou, Complainant, v. Canadian Union of Restaurant and Related Employees, Respondent**

**Financial Statement — Whether union member seeking financial statement agent of rival union — Involvement in and support of rival union not disentitling union member of statutory right to financial statement**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members F. Burnet and L. Collins.

**APPEARANCES:** *Martin Levinson and Chrisafina Alexiou for the complainant; Alick Ryder Q.C. and James Whyte for the respondent.*

**DECISION OF THE BOARD;** February 21, 1985

1. This is an complaint under section 85 of the *Labour Relations Act* for release of the financial statements of the respondent union. The complainant is a member of that union. Section 85(1) provides:

Every trade union shall upon the request of any member furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any member that the trade union has failed to furnish such a statement to him, the Board may direct the trade union to file with the Registrar of the Board, within such time as the Board may determine, a copy of the audited financial statement of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to such members of the trade union as the Board in its discretion may direct, and the trade union shall comply with such direction according to its terms.

2. The complainant requested the financial statements from the union for the period August, 1983 to August, 1984 by way of a letter dated September the 15th, 1984. She was offered the 1982-83 statement in person by her union's shop steward in mid-September. The complainant refused to accept that statement. The complainant then launched these proceedings.

3. The union is opposing the complaint by submitting that the complainant is not bringing these proceedings on her own behalf, but instead is actually acting as an agent for a rival union, the United Food and Commercial Workers Union (UFCW). The UFCW and the respondent union are currently engaged in a series of disputes over representation rights in several locations and they are also involved in several related cases before this Board. Because of the complainant's active support of the UFCW, the respondent union submits that she is acting as an agent of that union, and as such, should be disentitled to the relief she is seeking. Alternatively, it was submitted that the Board ought to use its discretion under section 85 to dismiss the complaint.

4. The union relied on several aspects of the evidence to establish that the complainant ought to be considered as an agent of the UFCW. Firstly, it was argued that the complainant had not established an independent interest or concern about the material in the financial statements. Secondly, after counsel for the respondent called the complainant's counsel, Mr. Levinson, to testify, Mr. Ryder established that Mr. Levinson's fees for these proceedings were



being paid by the UFCW. Thirdly, the complainant has organized employees on behalf of the UFCW by signing up memberships, distributing pamphlets and organizing meetings. Finally, the Board was told that the complainant had refused the union's offer of accepting the current financial statements on the condition that she did not disclose the information to the UFCW.

5. The respondent union also established in evidence that the UFCW had had the benefit of the receipt of the financial information as the result of a subpoena issued in other proceedings before this Board. Thus, counsel for the respondent union stressed that its reluctance to release information to the complainant was in no way the result of any embarrassment on its part.

6. On behalf of the complainant, it was admitted that she is a supporter of the UFCW, but it was denied that she was the agent of the UFCW. Alternatively, it was submitted that even if she was an agent of the UFCW, she had the right under section 3 of the Act to have and support the representation of her choice. Further, under section 85 she should have the right to receive the information from a union of which she is a member.

7. The evidence also disclosed that there is no reason why the financial statements should not be completed within a week of the date of this hearing. The practice of the union is to have the statements which have been completed by their auditors put before the Executive Board. Such a meeting is scheduled for February the 21st, 1985. After this, the statements will become available to the membership at large.

## THE DECISION

8. The issue raised in this case has never come before the Board before. Under section 85, the union has an obligation to furnish any member a copy of the audited financial statements upon request. This protects important rights of access to information of the membership. Section 85 does not give the right of access to anyone other than members of the union. In order to enforce the member's rights, the Board is also given discretion to decide to whom the statement ought to be given.

9. We can see nothing in section 85 or in the scheme of the *Labour Relations Act* that would lead us to conclude that the complainant has disintitiled herself to access to the financial information of her union. Her admitted involvement in and support of a rival union in itself cannot and should not affect her rights under section 85 as a member of the respondent union. Further, we are not satisfied on the evidence that she is in fact an "agent" of the UFCW. While she is certainly an active supporter of the UFCW, the evidence is not sufficient to establish more than that. Given this finding, it is not necessary or appropriate to rule upon the issue of what would be her rights if she was also an agent for UFCW.

10. In the result, the Board orders that the respondent union deliver to the complainant a copy of the audited financial statement of its affairs to the end of its last fiscal year, being August 31st, 1984. This statement must be certified by its Treasurer or other officer responsible for the handling or administration of its funds. Such a statement and the supporting affidavit which accords with section 85 shall be delivered as soon as practicable to the complainant and the Registrar of the Board after the statement has been approved by the Executive Committee of the union in the usual course of affairs, but in any event, no later than February the 28th, 1985.

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**1628-84-R; 1798-84-U** United Steelworkers of America, Applicant/Complainant, v. Osterley Investment Ltd., Adam Hay Holdings Ltd., and 462862 Ontario Ltd., carrying on business in limited partnership as **Benwind Industries**, Respondents

**Certification Where Act Contravened — Discharge for Union Activity — Unfair Labour Practice — Unlawful discharges — Threats to job security made at captive audience employee meeting — Wage increases and better benefits promised — Union certified without vote**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *David Nicholson and Fortunato Rao for the applicant/complainant; A. A. White and J. Benayon for the respondents.*

**DECISION OF THE BOARD;** February 26, 1985

1. This is an application for certification in which the applicant requests that the Board apply the provisions of section 8 of the *Labour Relations Act*. The applicant also filed a complaint under section 89 of the Act. The files were consolidated by decision of the Board (differently constituted) dated December 20, 1984. That decision dealt with the bargaining unit description and the status of one employee, Kevin Lauff, finding that employee to be properly included in the bargaining unit. This Board heard evidence and submissions with respect to the consolidated section 89 and application for certification.

2. The respondent called two witnesses, J. Benayon (president of the respondent company) and J. Weyermars (foreman). The applicant also called two witnesses, J. Fuentes and H. Guenther, both former employees challenging their terminations under section 89 of the Act. Both counsel raised the issue of credibility. The Board has assessed the credibility of the witnesses according to the usual criteria, namely, the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanour while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

3. It is also appropriate to comment at this point that the Board does not consider Benayon a credible witness. His testimony was self-serving and inconsistent. For example, the "lost contract" which was offered as the explanation for the September 20th meeting was described as "significant". Yet, when pressed in cross-examination, Benayon admitted that the value of the contract for 1984 was only 1% of gross sales and, although Benayon stated he expected the 1985 "lost" contract to be about \$2-1/2 million (or about 1/2 of the 1984 volume), there was no reasonable basis for this calculation in view of Benayon's own testimony concerning the clients' five-year plan. There is also no credible connection between the loss of the "contract" for 1985, which would not affect production in the September to December 1984 period significantly, if at all, with the announced layoff of approximately 20% of the workforce in September 1984. The Board refers to these examples in only cursory fashion here to illustrate the unreliability of the witness; details are given, *infra*. Thus, the Board rejects the testimony of Benayon wherever there is conflict with that of Fuentes or Guenther and,

further, rejects that testimony as a credible explanation of the reasons for termination of the two employees.

4. The Board would add that the testimony of Weyermars is also rejected with respect to the key issue of the explanation for the termination of Fuentes and Guenther. Weyermars appeared clearly uncomfortable when pressed on those issues and, especially with respect to one specific conversation with Benayon about the union. The Board does not accept that Weyermars “forgot” Benayon’s response to information that there was a union organizing drive, information which “flabbergasted” Weyermars to use his own word. The Board is prepared to draw an adverse inference from the convenient “lapses” in memory of Weyermars and Benayon on important points.

5. Having assessed the testimony and relative credibility of the witnesses, the Board makes the following findings of fact.

6. The respondent company manufactures wire and tubular products for use in store fixtures. Benayon is president and part-owner of the respondent company and is a part-owner of another firm, Ontario Store Fixtures. Benayon has a great deal of influence in the management of Ontario Store Fixtures, including the allocation of sub-contracts from Ontario Store Fixtures to the respondent company.

7. In late 1982, the respondent obtained a contract with an American firm. That firm had a five year plan to open approximately 400 stores. In 1983, the firm opened eighty stores; the respondent supplied at least some of the fixtures needed. In 1984, however, only two or three stores were opened; the respondent did only \$40,000 to \$50,000 worth of business with that firm (of a total volume of \$5 million). That work was completed in early 1984. Benayon testified that, in 1985, he was told that the firm would go ahead with the original programme. Benayon stated he expected fifty stores would be opened (this figure was revised to eighty) and this would generate a volume of \$2-1/2 million in business with this firm alone. Although Benayon was in continuous contact with the American firm, finally in September he was told that the store openings originally planned for 1985 were not going to proceed. This cancelled contract was asserted as the (or “a”) rationale for the layoff announcements. In fact, the respondent did not receive any orders from the American firm for 1985.

8. Even a cursory analysis of the above data reveals several implausible assertions. For example, a programme of 400 store openings over five years, with 80 stores opened in 1983 and only 2 or 3 in 1984, would require over 100 openings in each of the last three years. Yet, Benayon stated he expected 50 (then 80) openings. That figure does not make sense in the circumstances. Further, if 2 or 3 stores generated \$40,000 to \$50,000 worth of business, even Benayon’s figure of 80 stores in 1985 would generate a volume of \$1.6 million (assuming \$20,000 per store — an advantageous figure for the respondent). Yet, this volume is nowhere close to the \$2.5 million Benayon testified he expected in 1985 from the American firm. It is conceivable that the planned openings for 1985 were of bigger stores than those opened in 1984. However, Benayon stated he was never informed by the American firm as to which stores were to be opened or the number of openings planned. Thus, the data offered in justification of Benayon’s decision is not internally consistent.

9. Benayon testified that employees in the polishing department had approached him in June or July requesting a group insurance plan and a standardization of raises from the usual raise on the employee’s anniversary date to a yearly raise for all employees in September.



Benayon stated he agreed to consider both matters and instructed management personnel to obtain quotes from insurance companies. The Board need not determine whether these approaches were actually made. However, in view of Fuentes' and Guenther's testimony that no "department" meetings were held in early September to confirm that the benefit plan was to be introduced, the Board rejects Benayon's testimony that he spoke with all employees in departmental groupings before the September 20, 1984 meeting.

10. Benayon stated he decided on September 20th itself, as a matter of "fairness", to inform the employees of the lost contract and that ten employees would be laid-off. Benayon could not, however, give a credible explanation for the termination of Fuentes for "lack of work" on September 19th, i.e., the day before the "fairness" meeting, other than to state that, as Fuentes was a cutter, the layoff should start in that department. The Board has further comments about the selection of Fuentes, *infra*, at paragraphs 25 and 26.

11. Benayon testified he told Weyermars about the lost contract on September 17th and told him to start laying off one or two people "right away". The selection of individuals, though, was up to Weyermars. However, Weyermars said he first heard of the lost contract on the 20th, when Benayon told him to arrange the meeting. Later, Weyermars said he learned of the lost contract a few days before the 20th and that Benayon had mentioned the necessity of layoffs between the first conversation about the layoffs and the 20th. Weyermars first heard of the intended number of lay-offs, i.e., 10, at the actual meeting on September 20th.

12. The September 20th meeting was held at 3:00 p.m. on company premises during working hours. The employees were told to attend and were paid for the time involved. Benayon announced the loss of the contract and said that, in consequence, ten employees would be terminated. The individuals who would be terminated had not yet been selected and Weyermars would make that decision. Benayon assured employees that "he was not a quitter" and he would "try to find other accounts to replace the lost contract". Benayon also stated the company was introducing a standard wage increase for all employees as of the end of September, although persons who had received a wage increase within the past three months would be reviewed separately. Thirdly, Benayon announced the introduction of the group insurance plan, to be effective January 1, 1985, and explained the coverage.

13. Benayon conceded that he could not recall a time either when ten employees had been laid-off at one time or when there had been an announced layoff. The company practice was to terminate one or two employees at a time and hire replacements in order to respond to the ebb and flow of business. Since April 1984 roughly six individuals were terminated due to lack of work and nine as unsatisfactory. It was not company practice to maintain a list of "laid-off" employees for rehire when business picked up. October through December is generally slower but, because "rush jobs" are common, this decline is not certain. As it happened, notwithstanding the announcement, only Fuentes and Guenther were terminated. A mere ten days or so later, the respondent obtained a large subcontract from Ontario Store Fixtures. Benayon couldn't recall whether anyone was hired after September 20th. Weyermars acknowledged people had been hired in October, if not in September (after the 20th), but could not recall how many new employees commenced work. Weyermars was also evasive as to when he first learned that the respondent would be receiving the large subcontract from Ontario Store Fixtures. Finally, in this regard, the Board accepts the testimony of Guenther and Fuentes that they were asked to work overtime on a number of occasions in September. Fuentes had even been requested to work overtime the day before he was terminated.



14. Four employees asked questions during the September 20th meeting; i.e., Guenther, Sanduc, Leon and Ashrafi. Benayon could only recall Guenther's question dealing with cost of living increases. Guenther testified that he commented that, without a regular cost-of-living increase, a single raise per year wouldn't really be worth anything. Approximately, a half hour after the meeting ended, Guenther was terminated for "unsatisfactory work". However, Guenther was notified he was granted a raise earlier that week. This wage increase was approved after only five months of employment. Both Benayon and Weyermars testified that raises before the first year of employment was completed were only given to excellent employees. Weyermars also said he told Guenther on several occasions that the welding was unsatisfactory, although he could not recall the dates of such conversations. The Board rejects this explanation and accepts Guenther's testimony that he was never cautioned about his work performance. Guenther's testimony is in part supported by the undisputed granting of a wage increase. At one point, Weyermars also suggested that Guenther was terminated because of the lost contract, in addition to his unsatisfactory work. The Board deals with this *infra* at paragraph 28.

15. Benayon testified that he first learned of the union organizing drive on September 21st from Ashrafi. When Benayon offered Ashrafi the promotion, Ashrafi supposedly asked if the union drive was the reason for the promotion and showed Benayon a blank union membership card. In Benayon's words, he was "shocked" at the news.

16. Weyermars said he learned of the union campaign on the 21st as well but from his son in the shipping department. Weyermars said he was "flabbergasted" at the news and told Benayon later that day, on Friday afternoon. Weyermars described Benayon as "upset" and "not too happy" but could not recall any of that conversation. Benayon did not even mention this conversation with Weyermars in his testimony on the point. The Board cannot but draw an adverse inference from this "lapse in memory" as to the content of the discussion.

17. Fuentes testified that he and Ashrafi commenced the organizing drive on September 11, 1984. Ashrafi discussed the union with the employees first and then Fuentes approached those employees with cards. Only Fuentes collected the \$1 payment although Ashrafi did obtain some signatures on cards. Fuentes signed his first card on the 12th; the last card was signed on the 19th. Employees were contacted outside the factory before and after work and in the lunchroom on company premises. Ashrafi and Fuentes were in daily contact throughout this period. After Fuentes was terminated on the 19th, Ashrafi continued to try to collect signatures but was unsuccessful. On Tuesday, September 24th, however, Ashrafi told Fuentes he was not prepared to continue his involvement in the union organizing campaign. Fuentes also tried to obtain additional cards but was likewise unsuccessful. A few days after his termination, he approached more employees at the bus stop near the respondent company but the employees refused to sign, saying they were afraid they would be fired too. Finally, Fuentes stated some people he had approached said they opposed the union, that one individual said he couldn't sign because he was a foreman and that he could have been observed signing cards in the lunchroom at lunch. In Fuentes' opinion, he was fired as soon as the company learned he was involved in the union organizing activities. Fuentes has not worked since the termination; he applied twice for employment at Ontario Store Fixtures. It was not disputed that there were no complaints about his work.

18. Guenther was not formally involved in the union organizing campaign. He did ask several of the younger employees in the shipping department if they were interested in joining the union.

19. Benayon testified he called Ashrafi into his office on Friday, September 21st and "since we were not going to be busy at Benwind I decided to give him a promotion". Ashrafi was offered a position as foreman at Ontario Store Fixtures to commence the following Monday. Ashrafi accepted on condition that, if he didn't like the job, he could return to the respondent company. In fact, Ashrafi apparently was disenchanted with the job by 11:00 a.m. on Monday, told Benayon that and returned to the respondent. Fuentes, though, testified that Ashrafi told him on Monday, September 24th that he was fired and then rehired on the Tuesday.

20. Despite this "promotion" to Ashrafi, Benayon stated at another point in his testimony that he could only "recommend" new hires to the plant manager at Ontario Store Fixtures. Benayon later attempted to add more consistency into his earlier explanation regarding Ashrafi's promotion by stating he recommended Ashrafi to the plant manager who actually hired Ashrafi. This contradiction is not readily explained, as Benayon's initial testimony regarding Ashrafi's promotion was clear. However, the Board need not finally resolve this conflict other than to note this further undermines Benayon's credibility.

21. The Board does accept Benayon's statement that he was informed about Guenther's subsequent application for employment at Ontario Store Fixtures but was not so informed of Fuentes' application. Guenther was, in fact, hired by Ontario Store Fixtures on October 13, 1984 and has continued to work there up to the hearing date; Benayon stated he did not interfere in the hiring decision.

22. The respondent submitted that Fuentes had been terminated due to a work shortage resulting from the loss of the major contract. It was argued that this practice of termination when work was short conformed to the usual company practice and, as Fuentes was a cutter, the first step in the production process, he was the logical first choice. The respondent also suggested the applicant should have called other employees to corroborate the testimony of Fuentes that the terminations had "chilled" the organizing drive. The respondent asserted that the September 20th meeting was called for the purpose of informing the employees of the benefit plan, the standardized wage increases and the loss of the American contract and that there was nothing improper in this meeting. In summary, the respondent submitted the evidence did not indicate a violation of the Act and the section 89 charges should be dismissed. The certification application, it was argued, should be resolved on the basis of the card count or, if there was doubt, through a representation vote since a union should not be certified against the wishes of the employees.

23. The applicant submitted that the issue of credibility should be resolved in favour of Fuentes and Guenther but the Board should also expressly find Benayon and Weyermars were lying with respect to the explanations for the terminations and the September 20th meeting. Further, the failure to call Ashrafi should be held against the respondent, not the applicant. In the applicant's view, once the "layoff" explanation was found not to be credible, there was no innocent explanation for the terminations and, hence, there should be a finding that the Act had been violated. Counsel contended there was ample evidence to support a conclusion that the true wishes of the employees could not be ascertained through a representation vote, i.e., thus, providing the second element in a section 8 certification application. There were two terminations (Fuentes and Guenther) and one "promotion" (Ashrafi) of persons who were, or could reasonably have been regarded as, union organizers. The September 20th meeting was akin to a "captive audience" meeting at which threats to job security were made. Such threats to job security have been found to satisfy this aspect of the section 8 complaint; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 was referred to in support. Counsel submitted



that the third element, that there was sufficient union strength for collective bargaining, was demonstrated as well. The union had signed over 40% of the bargaining unit members before Fuentes was terminated and none thereafter. By way of remedy, the applicant sought reinstatement with compensation for Fuentes and Guenther, notices to be posted in the respondent's premises, at least one union meeting with the employees also on company premises and certification pursuant to section 8 of the Act.

24. Section 8 of the Act reads:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

25. The Board first examines the Fuentes termination. As noted, the respondent's explanation for the termination was a shortage of work due to the "lost contract". Quite simply, the respondent's account of the loss of the contract with the American firm and its impact on the respondent's business does not hang together. The Board has already noted the inconsistencies in the data presented by Benayon (see paragraph 8). The lost contract might well have affected the level of production in 1985; it would not, however, require the layoff of ten employees in September, 1984. The "work shortage" argument is even more transparent when one considered that Fuentes worked overtime in September and even had been requested to work overtime the day before his termination. Weyermars testified that production usually was planned for about two weeks ahead, although such orders could come in at any time. This known scheduling pattern yet further undermines the "work shortage" explanation. The Board is convinced that the only plausible account of the Fuentes termination was that Benayon learned that Fuentes was signing union membership cards. Benayon's protestations of lack of knowledge of the union campaign are rejected. Fuentes had approached a number of employees to solicit cards, including employees opposed to the union (and a foreman). Some solicitation occurred in the company's lunchroom. In the circumstances, it is only reasonable to assume that Benayon became aware of the organizing drive and Fuentes' involvement on September 19th.

26. Once this assumption is made, Benayon's subsequent behaviour forms a coherent pattern. That is, Benayon tells Weyermars to start terminating employees immediately and may even have suggested the cutting area as the first choice (or Benayon might have realized Weyermars would start there). Of course, it is also possible Benayon told Weyermars to fire Fuentes. The Board need not finally choose between these alternatives. Benayon decides the following morning to meet with all employees and makes both threats to job security and promises as to employment conditions. The one employee who appears to press the employer on raises is terminated immediately. The next day the curious interview with Ashrafi takes place and, as a result, Ashrafi ceases to participate in the campaign. Then, suddenly the subcontract with Ontario Store Fixtures is received. Not only are there no more terminations but new employees are hired.

27. The Board finds that the respondent has not satisfied the onus of showing that the termination of Fuentes was free of anti-union animus. The Board considers that the "work shortage" explanation was a fabrication but, even if there was to be some decline in work, the selection of Fuentes to be terminated was not without taint: see, for example, *Barrie*

*Examiner*, [1975] OLRB Rep. Oct. 745; *Charterways Transportation Ltd.*, [1982] OLRB Rep. Jan. 5. Thus, the termination of Fuentes constitutes a violation of sections 64, 66(a) and 70 of the Act.

28. The Board need deal only briefly with Guenther's termination. There was no credible evidence before the Board of unsatisfactory work performance so as to justify termination. The belated explanation of the "work shortage" factor which was also raised is rejected for the reasons set out above. Guenther was not a union organizer. However, he did speak in support of the union to two employees in the shipping department. Most importantly, Guenther, in effect, challenged Benayon at the September 20th meeting with his advocacy of regular cost-of-living increments and, implicitly, a real increase in wages in addition. It was reasonable for Benayon to have concluded (albeit erroneously) that Guenther was a serious supporter of the union. Guenther's termination a bare half-hour after the meeting was no coincidence. The Board, then, finds that this termination also contravened sections 64, 66(a) and 70 of the Act.

29. The September 20th meeting itself violated the Act. An employer need not remain neutral on the subject of unionization, however, an employer must not use his economic dominance to threaten job security or promise improvements in employment conditions: *Dylex Limited*, [1977] OLRB Rep. June 357, upheld 77 CLLC ¶14,112 (Ont. Div. Ct.); *Viceroy Construction Co. Ltd.*, [1977] OLRB Rep. Sept. 562; *Globe & Mail*, [1982] OLRB Rep. Feb. 189; *K Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60. Benayon did both. No reasonable employee would miss the message: ten employees, yet to be selected, were to be terminated, wage increases were to be standardized as of that very month; a benefit plan was to be introduced for the first time, effective January 1985. Even if the question of benefits had been raised earlier, the timing of the announcement was also not coincidence. Moreover, the September 20th meeting followed immediately in the wake of the Fuentes termination, thereby, enhancing the impact of the message.

30. The Board need not finally determine what transpired between Benayon and Ashrafi. If there was a firing then a rehire, as Fuentes stated Ashrafi told him, the firing contravened the Act and the "rehire" underscored the employer's position as the "source" of all benefits. If, as Benayon claims, there was a promotion, the Board regards this, too, as illegal conduct by the employer intended to interfere with the union organizing campaign contrary to sections 64, 66 and 70 of the Act.

31. The applicant has satisfied the first element required in a section 8 application, i.e., contravention of the Act. The Board then turns to the next issue, whether the true wishes of the employees would not likely be ascertained on a representation vote.

32. Substantial employer misconduct is required to justify this extraordinary remedy of certification pursuant to section 8: *Radio Shack*, [1979] OLRB Rep. Mar. 248, upheld 79 CLLC ¶14, 216 (Ont. Div. Ct.); *Ex-Cello Wildex, Canada*, [1977] OLRB Rep. June 370; *Manor Cleaners, supra*. The Board does, however, look to the cumulative impact of the employer's illegal activities: *K Mart Canada Ltd., supra*; *Robin Hood Multi-Foods Inc.*, [1981] OLRB Rep. July 972. In this case, there were two illegal terminations (Fuentes, Guenther), one instance of improper interference in the union campaign with respect to another individual (Ashrafi), a "captive audience" meeting at which blatant threats to job security (ten terminations) and open inducements (raises, benefit plan) were made. As well, the Board must assess whether the remedies which could be directed with respect to the violations of the Act would effectively "restore the atmosphere" to the point where the union could continue to conduct



its campaign. The Board does not consider that possible here in view of the circumstances, particularly the repeated illegal conduct. When all these factors are considered together, the Board is prepared to conclude that the true wishes of the employees, indeed, are not likely to be ascertained in a representation vote.

33. The applicant filed 23 membership cards in respect of the 51 employees in the bargaining unit. The cards of Fuentes and Guenther have been included in these figures. However, the one remaining lost card has not been included. (The Board in its decision dated December 20, 1984, in paragraph 5, directed a record check of the respondent's employment records; that check has not as yet been completed). Apart from this card, then, the applicant successfully solicited support from 45% of the bargaining unit between September 11th and 19th. No cards were signed after that date, the date of the Fuentes termination.

34. It is useful to refer to a relevant passage in *Manor Cleaners Limited, supra*, at this point:

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing "adequacy" are:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited, supra*; *District of Algoma Home for the Aged (Algoma Manor), supra*);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed — "the chilling effect" (*K-Mart*, [1981] OLRB Rep. Jan. 60);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Sommerville Belkin, supra*).

In assessing adequacy the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit, certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline, supra*, at paragraph 62).

35. The applicant had achieved sufficient support to warrant a representation vote in just over one week. The conduct of the employer on the 19th and 20th in particular constituted

serious and repeated violations of the Act. The “chilling effect” of that conduct was severe enough to dramatically impact on the organizing activities: one organizer, Ashrafi, refused to participate further; employees told Fuentes they were afraid to sign cards lest they be fired too; no further cards were signed. The Board accepts Fuentes’ testimony that he expected to sign approximately ten additional cards, sufficient to entitle the applicant to automatic certification. It is true that this estimate cannot now be tested empirically. However, the Board regards Fuentes as a candid and truthful witness and considers this testimony on this point as highly credible. The Board has no difficulty in finding that the applicant has demonstrated membership support adequate for collective bargaining.

36. The applicant has, thus, satisfied all the requisite elements in a section 8 application. The Board, for the foregoing reasons, therefore, exercises its discretion pursuant to section 8 of the Act and, consequently, certifies the applicant as bargaining agent for:

all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman and office and sales staff.

37. A certificate will issue to the applicant.

38. The Board has found the respondent to be in violation of sections 64, 66 and 70 of the Act in the termination of Fuentes and Guenther, the conduct of the September 20th meeting and the “interaction” with Ashrafi. The applicant, however, has not requested any remedial orders with respect to Ashrafi.

39. Consequently, the Board orders:

- (a) That the respondent sign and post copies of the attached notice marked “Appendix” as supplied by the Board in conspicuous places on its premises; that such notices be posted for 60 days and that the respondent take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; that reasonable access be given by the respondent to a representative of the applicant so that the union can satisfy itself that this posting requirement is being complied with.
- (b) That at least two representatives of the applicant be given an opportunity to hold two separate meetings, the first of which will occur within two weeks of the receipt of this decision or at a time satisfactory to the applicant, with all employees, without loss of pay, on the respondent’s premises during working hours but without the presence of any member of management. Each of these meetings may be as much as one hour in length. The second meeting will be held in the same fashion at a time satisfactory to the applicant. The respondent is ordered to make it a requirement of all employees to attend such meetings.
- (c) That the representative of the applicant will be provided reasonable notice of and access to any future meeting of employees sponsored by or called by the respondent which involves a discussion of the pros and

cons of collective bargaining with equal time to be afforded the applicant's representative to respond.

- (d) That the respondent offer to reinstate forthwith J. Fuentes and H. Guenther and that the respondent compensate for loss of credited service, wages and benefits, from the date of termination, less earnings during that period;
- (e) That the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980.

40. The Board will remain seized to resolve any dispute as to the implementation of these orders.

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## Appendix

# The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAY OFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PROVIDE REPRESENTATIVES OF THE UNITED STEELWORKERS OF AMERICA ACCESS TO OUR PREMISES DURING WORKING HOURS FOR THE PURPOSE OF CONDUCTING TWO SEPARATE MEETINGS OF THE EMPLOYEES IN THE BARGAINING UNIT OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT.

WE WILL PROVIDE REPRESENTATIVES OF THE UNITED STEELWORKERS OF AMERICA ACCESS, WITH REASONABLE NOTICE BEFOREHAND, TO ANY MEETING OF EMPLOYEES SPONSORED BY US WHICH INVOLVES THE DISCUSSION OF THE PROS AND CONS OF COLLECTIVE BARGAINING, WITH EQUAL TIME TO BE AFFORDED THE UNION REPRESENTATIVES TO RESPOND.

OSTERLEY INVESTMENT LTD., ADAM HAY HOLDINGS LTD.,  
AND 462862 ONTARIO LTD., CARRYING ON BUSINESS IN  
LIMITED PARTNERSHIP AS BENWIND INDUSTRIES.

PER:

\_\_\_\_\_  
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

**2832-83-M** Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Bird Construction Company Limited**, and The General Contractors' Division of the Construction Association of Thunder Bay Incorporated, Respondents, v. Julian Morelli, Peter Piotrowski, Interveners

**Construction Industry Grievance — Collective agreement not obligating employer to hire exclusively through union — Requiring only to endeavour to hire available members — No practice of hiring hall or out-of-work list established — Grievance dismissed**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and A. Grant.

**APPEARANCES:** *L. Arnold for the applicant; G. Grossman for the respondents; B. Fishbien for the employee interveners.*

**DECISION OF THE BOARD;** February 28, 1985

1. This is a grievance filed under section 124 of the *Labour Relations Act*. It alleges that the respondent company has contravened Article 4 of the collective agreement by which it is bound. That provision reads as follows:

Article IV — Union Security

4.01 The Employer agrees to hire as Employees, only members of the Union, so long as the Union is able to supply the needs of the Employer.

4.02 After forty-eight (48) hours' notice to the Union, the Employer is free to hire Employees from any other source, and these Employees shall become members of the Union within fifteen (15) days.

4.03 (a) All Employees shall remain members in good standing of the Union, so long as they are employed by the Employer.

4.03 (b) An Employee shall not be entitled to continued employment by the Employer when notified by the Union in writing that such Employee is not in good standing with the Union.

4.04 Employers shall give preference in hiring in the following order:

- (a) Members of the Union who have resided in the area within a radius of twenty-five (25) miles of the project immediately prior to the start of the project.
- (b) Persons who have resided in the area within a radius of twenty-five (25) miles of the project for at least six (6) months immediately prior to the start of the project and who furnish proof of such residence in the form of an affidavit.
- (c) All other members of the Union.
- (d) All other persons, providing that the Steward on the project is notified at the time.
- (e) It is understood that upon lay-off, it shall be done in the reverse order of hire.

The Chief Steward on the project shall be notified of the members and non-members to be laid off.

The Employees to be laid off will be given at least a half (1/2) hour notice of lay-off and the Employee must remain on the project for the half (1/2) hour. In lieu of the half (1/2) hour's notice, the Employee shall receive one-half (1/2) hour's pay.

4.05 Where mutually agreed to by the parties, the Employer may bring in employees for specialty work, and these employees shall obtain a work card from the Union before performing the specialty work.

4.06 All work as defined in Article XV of this Agreement, performed on the job site of the Employer, subcontracted in any form, shall be subject to this Agreement, unless such a sub-contractor is bound by a Collective Agreement with a bona-fide Union, which Collective Agreement was in effect prior to the sub-contractor bidding for the job.

For ease of reference, the parties will be referred to as "the union" and "the company".

2. The union contends that on or about February 13, 1984, the company hired Julian Morelli and Peter Piotrowski on its own initiative without contacting the local area steward, and without regard to their position on the union's established out-of-work list. Morelli and Piotrowski are both union members, but the union asserts that the company is required to contact it when it needs workers, and must accept such workers as the union refers. The company is not permitted to hire unilaterally or "off the street". The union seeks a declaration that the terms of the collective agreement have been violated and a direction that Morelli and Piotrowski be discharged. The union also seeks compensation on behalf of the employees whom it submits should have been hired.

3. The company concedes that it must make an effort to hire trade union members, but takes the position that it is not required to hire them exclusively through the union. The company submits that the collective agreement does not contemplate a hiring hall or referral list system, and, even if it did, no such system has ever existed in Fort Frances.

4. The company's submissions are supported by counsel for Morelli and Piotrowski, who argues, in addition, that the union cannot seek his clients' discharge when one of its own officials affirmed their right to conduct an independent job search and accept such employment as might be available. He argues that even if there has been a breach of the collective agreement, no remedy should run against the two employees. He further argues that the union has attempted to procure their discharge by resort to an unlawful strike, and that such conduct should not be condoned or rewarded. Finally, he argues that the hiring hall system (if it exists at all) was constructed and administered in such a way that is so obviously arbitrary, discriminatory and in bad faith, that the Board should not make any order based upon its supposed terms.

5. The hearings in this matter consumed several days. The Board heard the evidence of union officials Eric Hautala and Garry Gushulak, company representative Paul Reinhardt, and John Morelli, one of the employees whom the union seeks to have removed from the job site. We do not think that any useful purpose would be served by reviewing the details of that testimony. It suffices to say that we have made our factual findings based upon our assessment of the witnesses' overall credibility, taking into account such factors as their demeanour, the clarity, consistency and general plausibility of their evidence when weighed against that of the other witnesses, and their performance under cross-examination. On this basis, we unhesitatingly prefer the evidence of Morelli and Reinhardt whenever it is in conflict with that of Gushulak



or Hautala. In Mr. Gushulak's case, we are satisfied that much of his evidence is totally unworthy of belief. It was marked by evasions, contradictions, and outright fabrications — particularly in respect of the so-called work referral list upon which this grievance is based. In argument, counsel for the union suggested that certain statements made by Mr. Gushulak were so obviously false that they could only be explained by his nervousness. We draw a less charitable conclusion; moreover, in our view, it is not without significance that Mr. Gushulak has placed himself at the top of the so-called referral list and took the position that as area steward, he had a right of first refusal on available jobs. No such preferential hiring is indicated by Article 4.04 of the agreement. It is also interesting to note that even Mr. Hautala was not prepared to endorse the basis upon which Gushulak says he prepared the list.

6. Morelli has been a member of the union since 1974. He has never obtained work through a union referral system. He has never been given a referral slip. He testified that there has never been an out-of-work list in Fort Frances, or a referral system requiring that employees be dispatched only from the union. Indeed, in a moment of uncharacteristic candor, even Garry Gushulak conceded that trade union members commonly solicited their own work. He had done so himself. Company records also indicate that it has regularly hired union members without a union referral slip. While Gushulak asserted that, as area steward, he often wrote referral slips, he was singularly unable to produce copies, nor was he able to produce any earlier out-of-work lists. As counsel for the employees pointedly noted: if there is a hiring hall system in place, it is one which operates without records. There has not even been a union meeting in recent years. The only out-of-work list produced before the Board is a handwritten page in Mr. Gushulak's notebook; however, we find that his testimony regarding the origination and preparation of that list is totally unreliable.

7. In the fall of 1983, Morelli learned that the company had been the successful tenderor on a project in Fort Frances. Shortly thereafter, Morelli spoke to John Lorenovitch, a union official in Thunder Bay, and was told that the company was bound by a collective agreement. Morelli told Lorenovitch of his intention to seek work and was advised that, if he were successful, he would become the local area steward. Lorenovitch said that Gushulak had been the steward at one time, but had moved away so that there was now no area steward. It appears that Lorenovitch did not know that, although Gushulak had been away from Fort Frances for almost two years, he had since returned. In any event, Lorenovitch expressed no disapproval when Morelli told him he intended to approach the respondent for a job. After several tries, he was successful. Ironically, it was Morelli who first told Gushulak that the respondent might be needing workers in Fort Frances.

8. When Gushulak found out that Morelli and Piotrowski were working, he approached the company and demanded that they be replaced. In his opinion, as area steward, the company should have approached him and he should have been the first one hired. When the company refused to discharge Morelli and Piotrowski, Gushulak organized a picket line which precipitated an unlawful strike by other tradesmen working on the job. While Gushulak testified that this was merely an "information" picket line by a group of "concerned citizens", we are satisfied that he intentionally provoked a work stoppage in order to put pressure on the company to accede to his demand that Morelli and Piotrowski be discharged. To its credit, the company did not bend to this unlawful pressure. This grievance was filed on March 6, 1984.

9. It will be convenient to deal with the issues in the same order as the parties did in argument: whether Article 4 of the collective agreement obligates the company to secure employees only through the trade union; whether, in fact, there is a functioning job referral

system to which the company must resort to secure employees; and finally, whether in the circumstances of this case, the union should not be entitled to demand the discharge of the two employees whom it says were hired contrary to the terms of the collective agreement.

10. In the construction industry it is not at all unusual for a collective agreement to provide for a job rationing mechanism, commonly referred to as a “hiring hall”, which allocates available work opportunities among unemployed union members. Indeed, the hiring hall is so prevalent that it has attracted specific statutory treatment to ensure that it is operated fairly. Section 69 of the *Labour Relations Act* reads as follows:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

11. The particular details of the hiring hall system may vary from trade to trade and agreement to agreement. Sometimes there is an actual union office where unemployed members report for work before being dispatched to available jobs — usually on a first-in, first-out basis. Sometimes the work referral system is less formal. But what these various schemes have in common is that the union regulates access to work through issuing referral slips to members who have registered on an out-of-work list. Without a referral slip from the union, the member cannot work. For example, the local collective agreement with Local 1669 of the United Brotherhood of Carpenters and Joiners of America (another local of the same parent union) contains the following:

5.01 No Employer shall hire any journeymen or apprentice without a referral slip from the Union except in the case of a rehire within a 3 month period after a previous layoff, provided the journeyman or apprentice is in good standing with the union. The Employer shall notify the Union when any journeyman or apprentice is rehired.

The question here is whether Article 4 of this agreement (set out in paragraph 1 above) imposes a similar obligation, requiring the company to go through the trade union to fill its employee needs and prohibiting the hiring of any employees without a union referral slip.

12. It will be seen immediately that unlike the other Carpenters’ collective agreement, this one does not contain any specific reference to referrals from the union or hiring exclusively through the union. The language does not expressly contemplate a system in which union members are referred or dispatched from an established out-of-work list. Such language is so easily drafted and so common in construction industry collective agreements that one must remark upon its absence (see, for example, the hiring hall provision discussed by the board of arbitration — and later the Court of Appeal — in *Blouin Drywall* (1973), 4 L.A.C. (2d) 254). In this agreement, the only reference to obtaining union permission for hiring particular employees is found in Article 4.05. There is no similar prerequisite in Article 4.01 which, on its face, appears to require only that the union hire union members — not those members whom the trade union may designate or refer. Indeed, if the company were required to obtain employees through a union referral system, there would be no need for Article 4.04 which requires the company to give preference in hiring to certain designated groups. If the company were required to hire only those members whom the union dispatched from its out-of-work list, why would it be necessary to require the company to give preference to those members who lived within twenty-five miles of the project? If the union, not the company, were making the initial selection, that provision would be unnecessary.

13. In our view, when Articles 4.01, 4.02 and 4.04 are read together, they require only that the company endeavour to hire available union members before hiring non-union employees. The company is not required to contact the union in advance or to hire only those employees whom the union chooses to send. And, so long as those union members remain in “good standing”, they shall be entitled to continued employment. (See Article 4.03(b).) Accordingly, we find that the company did not breach the collective agreement when it hired Morelli and Piotrowski.

14. Even if we were to accept the union’s submission that the use of the words “supply” and “source” in Article 4 create an obligation similar to that in the other Carpenters’ collective agreement, we find that there was, in fact, no work referral system in place. At the time Morelli and Piotrowski were hired, there was no out-of-work list, there was no referral system, there was no established practice of securing employees through the union, and, indeed, in the last few years the union’s presence in the area has been minimal. Whether this is because of the low level of construction activity, or because of the erosion of its industrial membership, or for some other reason, the fact remains that when Morelli went looking for work on his own, and the company officials hired union members who presented themselves for work, they were both acting in accordance with what in their experience had been the area practice — a practice which they believed, and we find to be in conformity with the terms of their collective agreement. In the circumstances, it is hardly surprising that Lorenovitch expressed no surprise or concern that Morelli intended to approach the company in search of work. Thus, regardless of what the collective agreement might contemplate, we do not think that the company can be found liable for failing to comply with a referral system which, we find on the basis of the evidence before us, did not exist. Furthermore, we would not be disposed to direct the employees’ discharge, where, as here, there was no work referral system in place and their independent job search was in accordance with established area practice and known to and apparently approved by a union official long before Morelli was actually hired. Even if the company has not complied with the terms of the collective agreement, we do not think that the union could now demand Morelli’s discharge.

15. We are troubled by the employees’ alternative submission that the union should be denied a remedy under section 124 of the Act because it intentionally sought to achieve the same objective by unlawful means.

16. Obviously the Board does not condone a resort to unlawful industrial action to achieve compliance with a collective agreement or rectify what a union may see as a breach of the agreement. Section 124 of the Act provides a speedy remedy in such circumstances and that is the route the union should have taken here. On the other hand, illegal conduct by the union is itself subject to remedy and it is by no means clear that such improper conduct on the part of the union should excuse a breach of the collective agreement on the part of an employer. We prefer to leave this difficult question to a case where it is necessary to decide it. It suffices to say that, in appropriate circumstances, the Board may well be disinclined to grant relief to a party that has earlier sought to achieve its objectives by unlawful means.

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**2628-83-R** United Food and Commercial Workers International Union, Applicant, v. **Cabral Foods Inc.**, Respondent, v. Canadian Union of Restaurant and Related Employees, Intervener #1, v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Local 88, Intervener #2

**Certification — Collective Agreement — Interference in Trade Unions — Reconsideration — Trade Union — Unfair Labor Practice — Board's consent to early termination only affecting agreement between parties to application — Employer hiring undercover operatives as employees to assist organizing campaign of one of rival unions constituting unlawful interference — Unsolicited employer support of which union not aware not triggering sections 13 or 48 — Board not revoking certificates or directing votes in circumstances**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members W. G. Donnelly and C. A. Ballentine.

**APPEARANCES:** *A. M. Minsky, Q.C., and M. L. Levinson for the applicant; R. B. Cumine for Cara Operations Limited; S. C. Bernardo for M. Jeronimo Investments Inc.; S. McCormack for all other respondents; A. Ryder, Q.C. for interveners.*

**DECISION OF THE BOARD;** February 18, 1985

1. These twenty-four certification applications by the United Food and Commercial Workers International Union ("UFCW") were filed on various dates between February 10th and August 23, 1984. In each case, the employees affected work in a "Swiss Chalet" restaurant. Each of the respondent employers claims it is a member of the Swiss Chalet Employers' Association ("the SCEA") bound by the terms of a collective agreement between the SCEA and the Canadian Union of Restaurant and Related Employees (CURRE) dated October 19, 1981 ("the SCEA agreement"), with effect from November 9, 1981 to November 8, 1984. As each of these applications was filed well before the final two month "open period" of the SCEA agreement, the respondent in each case takes the position that the certification application is untimely by virtue of the provisions of subsection 5(4) of the Act. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 ("Local 88") filed an intervention in each of these applications, claiming that CURRE had merged with or into it on January 13, 1984, and that it should be treated as the successor to CURRE's bargaining and collective agreement rights. As that claim was challenged by the applicant, interventions were also filed in each application on CURRE's behalf, asserting the rights that CURRE claimed it must still have if Local 88 is not recognized as CURRE's successor.

2. In addition to putting the respondents and interveners to the strict proof of their assertions, the applicant has alleged in each case that Foodcorp Limited ("Foodcorp") assisted CURRE in the original organization and certification of the employees at a number of food outlets then operated by Foodcorp. In particular, it says that in 1979 Foodcorp retained Intertec Security & Investigation Limited to engage and instruct persons who, once hired by Foodcorp to work in its various outlets, would support and assist CURRE in organizing other Foodcorp employees at those locations. The applicant says these activities constitute employer participation and support of the sort contemplated by section 13 and 48 of the Act, which would adversely affect bargaining rights thereby acquired and deprive each of CURRE's subsequent agree-

ments, including the SCEA agreement, of status as a “collective agreement” for the purposes of the Act generally and of the timeliness provisions of subsection 5(4) in particular. The factual and legal issues relating to and arising out of these allegations of employer support are referred to here, as they came to be referred to by the parties in hearings to date, as the “Intertec issue”. We should note that Foodcorp Limited underwent a merger on April 1, 1984, as a result of which the respondent Cara Operations Limited is its legal successor for all purposes. For ease of reference, both Foodcorp Limited and Cara Operations Limited will be referred to throughout as “Foodcorp”. The other respondents will be referred to collectively as “the franchisees”.

3. The parties to the first several of the applications filed consented to have evidence and argument in them heard together with respect to common issues. As further applications were filed, the parties to those applications agreed to join in the hearings and be bound by the result. The scope of issues being heard evolved during the Board’s first set of hearings held on various dates during the months of March through June, 1984. That evolution was traced in paragraphs 3, 4 and 5 of our earlier decision dated September 12, 1984, which dealt with certain issues in the first twenty-one above-styled applications and three others. In the result, the hearing of evidence and argument with respect to the Intertec issue was deferred, and the first series of hearings, which affected those twenty-four applications, dealt with the following matters:

- (a) Local 88’s claim to be the successor to CURRE under section 62 of the Act;
- (b) UFCW’s argument that CURRE was no longer an existing trade union as a result of its failure to effectively merge with Local 88;
- (c) the respondents’ and interveners’ claim that the SCEA as an “employer organization” as defined by clause 1(1)(j) of the Act;
- (d) the respondents’ and interveners’ claim that the SCEA agreement was a “collective agreement” within the meaning of the Act;
- (e) in each case, the claim of the respondent and the interveners that the respondent was bound by the SCEA agreement, and that one or other of the interveners had bargaining rights for employees affected by the application.

It was recognized that a later determination of the Intertec issue might affect the last two of these questions, and that our determinations of those questions at the end of the first series of hearings might only be tentative.

4. When hearings resumed September 7, 1984, we read to the parties the text of a decision released in writing on September 12th, in which we set out the determinations we had made on the issues of fact and law with which the first set of hearings had dealt, with reasons to follow at a later date. We summarized those conclusions in paragraph 32 of that decision:

32. In summary, we have concluded that:

- (a) Local 88 is not successor to CURRE’s bargaining or collective agreement rights.
- (b) Subject to the effect, if any, of a determination of the “Intertec issue”, the agreement

between the Swiss Chalet Employers Association and CURRE is a collective agreement, the terms of which are binding on the respondents in, and serve as a bar to, the following applications:

<u>Board File</u>	<u>Respondent</u>
2628-83-R	Cabral Foods Inc.
2629-83-R	J. Paiva Foods Ltd.
2630-83-R	Manuel Goncalves, Restaurateur, Ltd.
2631-83-R	L.M.L. Foods Inc.
2686-83-R	L. DeSousa Enterprises Ltd.
2688-83-R	F. G. Andrioulo Foods Inc.
2831-83-R	Cara Operations Limited
2964-83-R	Cara Operations Limited
2965-83-R	Cara Operations Limited
0040-84-R	C. Calisto Foods Limited
0128-84-R	William Odorico Investments Ltd.
0129-84-R	G. H. Sousa Holdings Inc.
0144-84-R	Cara Operations Limited
0318-84-R	Cara Operations Limited
0407-84-R	D.N.M. Lau Foods Inc.
0493-84-R	Cara Operations Limited

- (c) The following applications are timely, and neither intervener has established any pre-existing right to represent the employees affected:

<u>Board File</u>	<u>Respondent</u>
2766-83-R	Dinnerex Inc.
2966-83-R	Famz Foods Limited
0020-84-R	Bini Foods Ltd.

- (d) The following applications are timely but, subject to the effect, if any, of a determination of the Intertec issue, CURRE has existing bargaining rights for the employees affected:

<u>Board File</u>	<u>Respondent</u>
2830-83-R	Famz Foods Limited
0336-84-R	Famz Foods Limited

- (e) Our determination with respect to the following applications is subject both to the effect, if any, of determination of the Intertec issue and the resolution of matters discussed in paragraphs 27 to 31 hereof, on which we invite further submissions:

<u>Board File</u>	<u>Respondent</u>
2687-83-R	485376 Ontario Limited
2689-83-R	Rahims Food Limited
2829-83-R	555618 Ontario Ltd.

Elsewhere in the discussion we noted our conclusion that CURRE had not ceased to exist as a result of its executive board's ineffective attempt to merge it into Local 88.

5. As we had found them to be timely, the applications referred to in paragraph 32(c) of our decision dated September 12, 1984 were each heard and disposed of individually on September 19, 1984. The further submissions contemplated by subparagraph 32(e) of that decision were heard on September 19, 1984, and our final conclusions with respect to the subject matter of those submissions are set out in Part I of this decision.



6. The first date of hearing before us in Board Files 0922-84-R and 1239-84-R was September 7, 1984. The first date of hearing before us in Board File 1353-84-R was September 17, 1984. That application involved a respondent not party to the earlier proceedings. That respondent, and the other parties, agreed that the application affecting its employees would be heard together with the others with respect to the Intertec issue, which was the only common issue left to be tried in the other applications. Hearings dealing with the Intertec issue proceeded on September 17 and 18, October 11, November 22 and December 17, 18, 19 and 20, 1984. That issue is dealt with in Part II of this decision.

## PART I

### Outstanding Issues in Board Files 2687-83-R, 2689-83-R and 2829-83-R

7. In our decision dated September 12, 1984, we invited further submissions on the question whether three of the respondents were bound to the SCEA agreement. The considerations which prompted that invitation were set out in paragraphs 27 to 31 of that decision, which read:

Applications in which 485376 Ontario  
Limited, Rahims Food Limited and  
555618 Ontario Limited are respondents

27. The evidence before us establishes that the restaurants at locations affected by these three applications (Board Files 2687-83-R, 2689-83-R and 2829-83-R, respectively) were being operated by founding members of the SCEA on September 2, 1981 when the SCEA was formed. The application of our general findings to the circumstances of these applications raises considerations which were not addressed in argument by any of the parties. Accordingly we propose to review those circumstances, highlight the unaddressed concerns and reserve our final conclusions until the parties have had a further opportunity to address the matters newly raised here.

28. The application in Board File No. 2829-83-R affects employees employed by 555618 Ontario Limited at 260 Dundas Street, London, Ontario. The evidence is that Foodcorp opened an operation at that location in May, 1969. CURRE was certified as bargaining agent for a unit of employees of Foodcorp at that location on July 25, 1979, in Board File 0613-79-R. CURRE and Foodcorp then became parties to a collective agreement covering employees employed at that location, with effect from July 25, 1979, to July 24, 1982. Foodcorp "franchised" this location to Bruno Bini on January 19, 1981. On the basis of the evidence and argument, we would treat this "franchise" transaction as a sale of business within the meaning of section 63 of the *Labour Relations Act*. It appears to us, however, that this would have resulted in Bruno Bini's having become bound by the terms of this first agreement between Foodcorp and CURRE. Foodcorp and CURRE applied for and were granted the Board's consent to the early termination of their first agreement in a decision dated October 19, 1981, in Board File 1401-81-M. There is no evidence that Bruno Bini joined in that application or filed a separate application of his own. It would therefore appear arguable that Bini and CURRE continued to be bound by the terms of that first agreement with respect to Bini's employees, even though its application to Foodcorp and Foodcorp employees had been terminated upon the granting of the Board's consent, and that this was so until the expiry of that agreement's original term on July 29, 1982. If that is so, Bini could not have become bound by the SCEA agreement at the time it was entered into, having regard to the provisions of sections 49 and 52(3) of the Act. Having regard to our general findings, it is not apparent how Bini could thereafter have become bound to the terms of the SCEA agreement or any renewal agreement with CURRE, if he did not become bound to the SCEA agreement at the time it was entered into.

29. We have it from the evidence that there was a further transaction June 12, 1983, by which 555618 Ontario Ltd. became the employer of employees at the location in question. The evidence comes from Ms. Paszkowski, and she was less than clear about the nature of the transaction and the parties to it. At one point she said the location had been "refranchised" to 555618 Ontario Ltd. That suggests that Foodcorp may have been involved directly. However, Ms. Paszkowski testified it was her belief that the transaction in question was between Bruno Bini and 555618 Ontario Ltd. Whatever Foodcorp's involvement may have been in this transaction, the immediate predecessor business was that of Bruno Bini, and the putative successor business is that of 555618 Ontario Ltd. Consistent with our other findings in this regard, we would treat this transaction as a sale of business from Bruno Bini to 555618 Ontario Ltd. on June 12, 1983. If, as may be argued, there was no subsisting collective agreement binding upon Mr. Bini as of that date, then subsection 63(3) of the Act would apply. CURRE would be entitled to claim bargaining rights with respect to employees of 555618 Ontario Ltd. falling within the bargaining unit described in the first collective agreement between CURRE and Foodcorp.

30. Ms. Paszkowski testified that when 485376 Ontario Limited executed SCEA's constitution on September 2, 1981, it was the employer at a restaurant at 540 Montreal Road, Ottawa. Foodcorp had opened that restaurant in August, 1979, and operated it until it was "franchised" to 485376 Ontario Limited at some unspecified time prior to September 2, 1981. The evidence also establishes that CURRE was certified to represent employees of Foodcorp at this location on October 31, 1979 in Board File 1310-79-R and that Foodcorp and CURRE then entered into a collective agreement covering those employees, with effect from October 31, 1979 to October 30, 1982. Rahims Food Limited currently operates the restaurant at that location, which is now the subject of the application in Board File 2689-83-R. 485376 Ontario Limited now operates the restaurant at 2930 Carling Avenue, Ottawa, which is the subject of the application in Board File 2687-83-R. That restaurant was opened by Foodcorp in February, 1978. Ms. Paszkowski says that when Rahims Food Limited signed the SCEA constitution on September 2, 1981 it was the employer at this location, which had been "franchised" to it by Foodcorp at some earlier date. CURRE had been certified to represent Foodcorp employees at this location on May 17, 1979 in Board File 0166-79-R, and Foodcorp and CURRE then entered into a collective agreement covering those employees, with effect from May 17, 1979 to May 16, 1982. Ms. Paszkowski's evidence is that Rahims Food Limited and 485376 Ontario Limited switched or traded these locations at some time after September 2, 1981, in a transaction about which she knew nothing other than its result. Although Foodcorp and CURRE applied for and on October 19, 1981 were granted this Board's consent to early termination of its agreements with CURRE with respect to these locations (Board File 1401-81-M), there is no evidence that any such application was ever made by either 485376 Ontario Limited or Rahims Food Limited. As with Bini, it appears arguable that both respondents were bound by unexpired collective agreements at the time the SCEA agreement was entered into, could not have become bound by that agreement at that time, and did not become bound thereby at any subsequent time.

31. We do not propose to draw any final conclusion with respect to these three applications until we have the benefit of the parties' submissions on the question whether any of the respondents therein was bound to an unexpired collective agreement at the time the SCEA agreement was entered into and, if any was, what would follow therefrom.

8. Counsel for the interveners and the franchisees argued that the Board's early termination decision had been effective to terminate the collective agreements between CURRE and the three franchisees in question, even though none of the three was named in that decision. They both submitted that we could take it that Foodcorp was acting as agent for the franchisees in making the application. Counsel for the franchisees noted that an application for early termination had been contemplated in the minutes of the founding meeting of the SCEA. Whatever may have been contemplated, the text of the Board decision treats Foodcorp as the employer, and we are obliged to assume that that is the capacity in which Foodcorp purported to join in the application which led to the decision. Had an application been made expressly

as agent for a named employer, the style of cause would have named that employer. No one has argued that the Board dealt improperly with whatever material was before it at the time the application for consent was made. There has been no application to reconsider the decision in question.

9. Both counsel also argued that the decision applies to any collective agreement in operation at the locations referred to therein, and so would affect the agreements to which the franchisees had earlier become parties by operation of section 63. They seek to bolster that contention with the further submission that there was no agreement between Foodcorp and CURRE applicable to the locations in question at the time of the order, and so effect can only be given to the decision if it terminated the franchisees' agreements at those locations. This submission is based on the proposition that, on a sale of business, section 63 operates by substituting the successor for the predecessor in the collective agreement which covered the predecessor's employees in the business sold, so that the predecessor is not bound thereafter by the terms of that agreement. Both arguments are without merit. The Board grants consent under section 52 with respect to the early termination of a collective agreement between the parties who apply for the consent, and not with respect to every collective agreement which might be in operation at a particular location. Furthermore, section 63 does not extinguish any of the predecessor employer's collective bargaining or collective agreement obligations. When a sale occurs during the term of a collective agreement covering a unit of employees of the predecessor engaged in the sold business, the result of the operation of section 63 is that a separate collective agreement is effectively created between the successor and the union party to that collective agreement covering persons employed by the successor in the sold business. There will then be two agreements and two collective bargaining relationships, when once there was only one. Of course, one of those agreements will have nothing to operate on if the predecessor no longer has employees who fall within its bargaining unit description, but the absence of such employees no more terminates the predecessor's obligations that it would if a sale had not taken place.

10. Another argument was that, after all this time, the intervenor union was entitled to rely on the decision as having had the necessary effect, particularly as the parties had behaved as though the collective agreements with those franchisees had been terminated early. The simple answer to that submission is that the extent to which the interveners are entitled to rely on the decision is the very point in issue, and if it were enough for the parties to behave as though their collective agreement had been terminated early, the statutory prohibition against early termination without Board consent would be meaningless.

11. Only the parties to a collective bargaining relationship can effectively amend or apply for consent to early termination of the collective agreement obligations by which they are bound. We are satisfied that no consent to early termination granted to Foodcorp and CURRE with respect to any collective agreement to which they may have been party was effective to permit early termination of contemporaneous collective agreement obligations between CURRE and one of Foodcorp's franchisees, no matter how those obligations had earlier come into existence. The consequences of that conclusion are as set out in the passage quoted from our earlier decision: the three applications in question are timely, but must (subject to the outcome of the Intertec issue) be treated as displacement applications.



## PART II

The "Intertec" Issue

12. CURRE was first certified to represent employees of Foodcorp at one of its Swiss Chalet restaurants in October, 1978. In February, 1979 it was certified to represent the employees at three more Swiss Chalet restaurants. By the end of August, 1979, it had been certified to represent employees at a total of thirteen Swiss Chalet restaurants in Ontario. In September, 1979, CURRE filed certification applications with respect to two more Swiss Chalet restaurants. In each case, the respondent employer was Foodcorp. CURRE was no stranger to Foodcorp. In 1975, Foodcorp had voluntarily recognized CURRE as the bargaining agent for employees at nine of its "Harvey's" operations. In order to keep subsequent events in perspective, it is important to note that there is no evidence before us that Foodcorp or any other employer participated in the formation of CURRE in 1975 or thereafter improperly assisted CURRE at any time before the events of October and November, 1979, to which reference will be made.

13. At about the beginning of October, 1979, Local 254 of the Hotel, Restaurant and Cafeteria Employees Union applied for certification with respect to employees of Foodcorp at its Swiss Chalet restaurant at 2990 Eglinton Avenue East, in Scarborough. The Foodcorp employee then in charge of labour relations matters was Kevin Boyd, a former Toronto policeman whose other responsibility was security. On or about October 5, 1979, Boyd retained the services of Intertec Security & Investigation Limited ("Intertec").

14. This was the first time Intertec had been asked to act for Foodcorp. What it was asked to do was a matter of considerable controversy in these proceedings, and will be described for the moment as "an investigation". There can be no doubt that Intertec was asked to do "an investigation" at seven Swiss Chalet restaurants. An Intertec employee was to and did become employed at each restaurant, after making application for employment in the ordinary way. The undercover operative would be and was paid by Foodcorp at the same hourly rate and perform the same duties as any other Swiss Chalet employee. Intertec would and did pay each operative at a higher hourly rate for each hour the operative spent on the "investigation" outside of her work hours at the restaurant, and would and did make up the difference between the two rates for hours for which she was also paid directly by Foodcorp. The operatives' living and other expenses would also be and were reimbursed. Foodcorp would be and was billed at an hourly rate for field work and supervision, plus expenses. Seven Intertec operatives were dispatched to seven Swiss Chalet stores in October, 1979. Each spent about two or three weeks at the assigned store. The operatives were instructed, dispatched and supervised by Barry Wilson, an Intertec "supervisor". Wilson was the link between Intertec and Boyd after the initial meeting of October 5th. Foodcorp paid Intertec over fourteen thousand dollars for this "investigation".

15. The people who would best know what "investigation" was asked for are Kevin Boyd and Barry Wilson. Kevin Boyd died in June, 1980. Barry Wilson left Intertec in the spring of 1980, but was available at the time of our hearings, and could have been called as a witness. He was not.

16. The applicant subpoenaed Hal Flinn, President of Intertec, to testify with respect to his knowledge of the services performed for Foodcorp and to produce any relevant documentation in his company's possession. Mr. Flinn recalled the meeting with Wilson and Boyd when Intertec was first retained in early October, 1979. He did not remember anyone else being at that meeting. He recalled that Boyd asked for a "health check" — an investigation to discover

whether theft was taking place, and to find out the state of employee morale: whether there were disgruntled employees, who they were, the reasons for unhappiness and the state of the relationship between employees and supervisors. Flinn remembered Boyd mentioning either that a union was in or that a union was coming in. Flinn said he was familiar with industrial relations in 1979. He told counsel for Foodcorp that he would not have allowed his company to become involved in anything illegal. That counsel then asked whether it would have been illegal in 1979 for a company to assist a union in getting to represent its employees. Flinn answered that it would be unusual, but not illegal. He did not recall being asked to participate in that kind of activity, and felt he would recall if he had been asked. Flinn was able to produce documentation relating to the employment by Intertec of five of the seven operatives sent to Swiss Chalet Stores in October, 1979. He also produced documentation evidencing the invoicing of and payment by Foodcorp for the "investigation" at the seven stores. He said that Intertec did not still have copies of the written reports which would have gone to Foodcorp; such copies would have been destroyed in the ordinary course long before these proceedings began. The only such report in evidence is one located by Foodcorp in its files.

17. Naduff Consultants is the trade name of the numbered company that acts as administrator of the group insurance plan provided for in the SCEA agreement with CURRE. Charmaine Fullerton is the owner of Naduff Consultants. She shares office space with CURRE and Local 88. She has a personal relationship with Bill Whyte of CURRE and Local 88. That relationship led to the termination, in July, 1983, of her previous employment by Foodcorp in its industrial relations department. She had been a hostess at a Swiss Chalet restaurant in September, 1979, when Kevin Boyd had her transferred to head office to work in industrial relations. While Boyd was in charge of both industrial relations and "security", prior to Boyd's death Fullerton was only involved in industrial relations. She testified that she went with Boyd to his initial meeting with Intertec in October, and to a second such meeting the following week. Her understanding was that "for security reasons" Boyd wanted operatives put in several stores "selected at random", because he wanted to see if there were cash shortages, thefts or problems with management. She was adamant that there was no mention of a union at the meetings she attended. She had not been aware of any plan to assist CURRE, and thought Boyd would have told her about such a plan if there had been one.

18. After Kevin Boyd died at the end of June, 1980, Ms. Fullerton (then known as Charmaine Papayanidis) was the only person in Foodcorp's industrial relations department, such as it was, until Allen Morrow was hired as Director of Industrial Relations in late October, 1980. She testified that she took over the security function when Boyd died. Foodcorp was then negotiating a first collective agreement with Local 254 of the Hotel, Restaurant and Cafeteria Employees Union, which had on October 25, 1979 been certified as bargaining agent for Foodcorp employees at the Swiss Chalet restaurant at 2990 Eglinton Avenue East. Fullerton thought the negotiations were taking a long time, so she hired Intertec to place an operative in that store. She received reports from Intertec on that operative's activities, which focused on assessing the determination of the employees to go on strike and involved urging employees to vote in favour of the company offer. Ms. Fullerton was not aware until she gave testimony in these hearings that in August and September, 1980, Foodcorp received reports from another security firm on the similar activities of an operative that security company had placed in the same store, purportedly as a result of a request made by Boyd prior to his death. Of course, the fact that Intertec interfered in union matters for Foodcorp in 1980 does not establish that it did so in 1979; it does dispel the notion that such activity was unthinkable either to Intertec or to someone who had worked in industrial relations with Mr. Boyd. While the existence of these reports is not proof of their contents, Ms. Fullerton's unawareness of reports of that sort

received by Foodcorp at a time when she believed she was in charge of both industrial relations and security matters is some measure of the accuracy of her belief that she would have been aware of what Boyd was up to in the fall of 1979.

19. Margaret Salisbury was one of the seven operatives Intertec sent to Swiss Chalet restaurants in October, 1979. She had been hired by Intertec as a security guard in August, 1979. After she had worked in that capacity at various locations for several weeks, she asked the personnel manager for a transfer to different work. In early October she was called to a meeting with Barry Wilson at Intertec's offices. There were several others at the meeting, including three women whom Salisbury got to know later that year when they all worked as strike replacements supplied by Intertec to Fotomat. Those three were Luba Kurman, Joy Nadeu and Laurie Burns, whom the documentary evidence establishes were three of the operatives sent by Intertec to Swiss Chalet restaurants in October. The meeting had two parts. In the first, Wilson described field work in general terms. At the end of that part, the participants were invited to leave if they were not interested. They stayed. Wilson then told them that the client was Foodcorp, and that they would each be sent to one of its Swiss Chalet restaurants, where they were to apply to local management for a job. If they were not hired within two days, they were to call in and arrangements would be made to ensure their employment. They were told there were two unions; one with a long name which Salisbury wrote down as CURRE, and another with a long name which she could not remember; she thought it had the word "North America" in it. While working at their assigned restaurants, they were to persuade employees there to join CURRE. They were to push the union without being conspicuous. Their "contact" with the union would be Cathy Perry. Pushing the union was not the only thing they were to do. Ms. Salisbury testified there were other duties; they were also to report anything that happened, especially pilfering.

20. Margaret Salisbury was assigned the Swiss Chalet restaurant in Niagara Falls. She went there and got a job as a waitress. A few days afterwards, a woman from a union other than CURRE met with some of the waitresses in the change room of the restaurant. One morning a few days after that, at or before the time the restaurant normally opened, a woman and two men arrived and met with employees in the restaurant. The woman introduced herself as Cathy Perry, and said she was from CURRE. She invited the employees to apply for membership. They had been afraid to even talk about a union, Salisbury says, and they were reluctant to sign. Salisbury said she would sign, "breaking the ice" as she put it. Perry gave Salisbury some applications, to help sign up employees. She got a few employees to sign, then persuaded Liz Duffy, a waitress with whom she had become friendly, to take over the collection of signed applications. The applications found their way to Perry, CURRE filed an application for certification on October 25, 1979, and the customary green notices to employees were posted. Salisbury quit her job at the restaurant on about November 9th. CURRE was certified to represent the employees at that restaurant on November 20, 1979.

21. Catherine Littlefield (as she was then known) worked for Intertec from August, 1979, to July, 1983 at a range of assignments, including undercover work. Her supervisor in 1979 was Barry Wilson. In the first week of October, Wilson called her in to his office and told her several employees were being sent to various Swiss Chalet locations because Swiss Chalet wanted to unionize all their stores, and had hired Intertec to send investigators to put the union in. She was told to go to the Swiss Chalet restaurant in Waterloo and apply for a job, using as a reference the name of a man whom she was told worked at Swiss Chalet's head office. Wilson also gave her the name and telephone number of a trade union. She was to find the employees most anxious to have a union, single out a likely leader, and give her the name and



telephone number. She was not to handle cards or call in the union herself. She was to get the girls signed into the union, then drop out of sight.

22. Littlefield went to Waterloo. She applied for and got a job as a waitress at the Swiss Chalet restaurant there. She recalls starting just after Thanksgiving, around October 10th. She became friendly with a group of waitresses right away, and went out drinking with about seven of them three or four days after she started work. They started "talking union". They were fed up with their working conditions. They went back to Littlefield's hotel room, where she had a book about unions from the public library, to continue the discussion. When that discussion had reached a suitable stage, Littlefield went to the telephone book, took out the note of the name and number she had been given, and pretended to copy that name and telephone number from the telephone book. She then gave the note to one of the waitresses, who the next day had union cards and was signing employees. Littlefield signed and paid a dollar, which she later claimed as an expense. She later saw a green notice posted in the changing room; it had on it the name of the union whose name and telephone number she had given and whose card she had signed. She left very shortly thereafter, as a result of catching mumps from a customer's little boy.

23. CURRE was certified as bargaining agent for the employees at the Swiss Chalet restaurant in Waterloo on November 20, 1979. Littlefield went on to work as a strike replacement in the Fotomat strike in early November. Cross-examination of her established that the Swiss Chalet job was for a long time the only undercover job she had done which involved a union, until Intertec sent her to Saskatoon to assist in the de-certification of a union at a hotel there.

24. While working at their respective Swiss Chalet assignments, Salisbury and Littlefield regularly submitted written reports to Barry Wilson. It appears from the one surviving report from Intertec to Foodcorp that the operatives' reports would be summarized in the reports Foodcorp received, although we cannot now know how complete the summaries were. Fullerton remembers seeing regular reports from Intertec in the period after Intertec was retained in the fall of 1979. She recalls reports making reference to cash shortages and to green sheets. She was of no further assistance with respect to the reports Foodcorp received from Intertec at that time.

25. Cathy Perry (as she was known at the time of the events in question) had been a waitress in a Swiss Chalet restaurant in Etobicoke until early 1979, when CURRE was organizing that restaurant. She was fired at that time, and CURRE made a complaint that she had been fired for union activity. She received six weeks' pay in settlement of that complaint, and was hired by CURRE's then General Manager, William Von First, to assist him in organizing other Swiss Chalet restaurants. She testified that she was not aware of any arrangement between Von First and Boyd whereby Foodcorp would arrange for undercover assistance for CURRE's organizing campaign. She thought it unlikely that either Von First or Boyd would make such an arrangement, as they seemed antagonistic toward one another. Fullerton testified to the same effect. Perry described her organizing activities, and said she would not have been involved in organizing the Niagara Falls store. It was clear that her belief in this regard was based on the fact that she only went out of town if she had someone to drive her. Her independent recollection of the events of 1979 was extremely weak. She was not adamant in her claim that she was not at the Niagara Falls before it was certified. Salisbury testified before Perry did, and her identification of Perry as the person who attended at Niagara Falls was not challenged in cross-examination. Salisbury said Perry had been accompanied

by two gentlemen, which provides a potential explanation of how she could have got there. In this particular, we do not consider Salisbury's evidence shaken by that of Perry.

26. In assessing the evidence of the witnesses we heard, we are acutely aware of the effect of the passage of time. Witnesses who have no reason or motive to fabricate or distort what they recall may nevertheless suffer so hazy a recollection that it becomes difficult for them to distinguish between a recollection of what happened and a belief as to what must have happened given what they now know. This is more likely to be so with respect to events or details which would not at the time have struck the witness as significant or out of the ordinary. Those who question the witness later, whether in the hearing room or outside it, can subconsciously and quite unintentionally supply the confusing "what must have happened" by making their own assumptions about what must have happened implicit in their questions. A good example of this emerged in the questioning of Salisbury and Littlefield about the CURRE cards they said they had seen and signed. Although Littlefield had earlier worked in a unionized factory, the evidence does not establish whether she had ever before signed an application for trade union membership or, if she had, what form the application had taken. Nothing in the evidence suggests that Salisbury would ever have seen an application for union membership before she went to the Swiss Chalet restaurant in Niagara Falls. Indeed, there is no reason to suppose that either of them knew that an application for membership in a union is usually in the form of a card. The form of the application they handled in 1979 would not have seemed significant to them at that time. Although someone familiar with unions and union organizing generally would have found it odd if, for example, the form of an application for membership in CURRE was letter-sized, rather than card-sized, in their inexperienced state Salisbury and Littlefield would have thought it unexceptional and unworthy of note. Five years later, the repeated use of the word "card" to describe the application, at first by the applicant's counsel and especially later by CURRE's own counsel, would have led these witnesses to doubt and discard any faint mental image they might still have of a letter-sized document and substitute for it the image of a card-sized document of the sort these learned counsel, especially CURRE's lawyer, would seem to them to think they must have seen. By the time CURRE's counsel finally asked "what size was the card", then sought to contradict the predictable answer by suggesting, as the fact was and as counsel for CURRE knew all along, that the applications were on paper 8 1/2 by 11 inches in size, the witnesses' denials were of little assistance to us in assessing their credibility or the accuracy of their recollection of events which would have seemed more important to them at the time they occurred.

27. Both Littlefield and Salisbury were subjected to intense cross-examination. Neither had any apparent reason to fabricate their evidence. Littlefield having been located in Saskatchewan only days before she testified; the consistency between her evidence and that of Salisbury could not be the result of any recent sharing of reminiscences. Indeed, there was nothing to suggest that the two had had any contact with each other since 1979 when they worked as strike replacements in the Fotomat strike. Barry Wilson was not called to contradict anything either of them said about the instructions he had given them. We accept Littlefield's evidence as truthful and accurate. We accept a good deal of Salisbury's evidence as accurate, and we are satisfied that she believed all of it to be accurate and intended all of it to be truthful. However, there were areas in her testimony in which she seemed highly receptive to suggestion, particularly on the subject of what Wilson had said about the relationship between Foodcorp and CURRE. Her evidence in this area changed during her testimony, and grew to be so apparently fanciful that counsel for the applicant made no attempt to rely on it. While it may be a case of truth being stranger than fiction, we are not prepared to believe that Wilson told Salisbury that CURRE was "owned and operated" by Swiss Chalet. Even if we could believe that he had

said that to Salisbury, we would not accept that hearsay as evidence that CURRE was in fact a company dominated or controlled union. If Wilson had some reason to believe such a thing, then he could have been called by the applicant as a witness to give testimony to that effect.

28. We find that Salisbury and Littlefield were instructed by Wilson to persuade employees at the Niagara Falls and Waterloo Swiss Chalet restaurants to join CURRE. We find that similar instructions were given to Luba Kurman, Laurie Burns and Joy Nadeau. We have no direct evidence of the instructions given to the other two operatives who were sent to Swiss Chalet restaurants. We find that Salisbury and Littlefield did take steps which were calculated to and did influence some employees at the stores to which they were sent into joining CURRE. We cannot make that finding with respect to any of the other operatives. Even though we have found that three of those other operatives were instructed to promote CURRE, we cannot assume from that that they did so, especially when they were available to testify and were not called by the applicant.

29. Flinn thought it would be unusual for an employer to want to covertly assist a union in organizing its employees. Taking that as the perspective of someone in Flinn's business, we think it highly unlikely that Wilson, a man in the same business, would instruct operatives to assist a union to organize his client's employees unless the client had asked him to do so. We do not believe, as Fullerton says she did, that the seven stores were selected at random. At the beginning of October, 1979, CURRE had bargaining rights at thirteen stores in Ontario and had an application for certification pending with respect to one more. On the evidence before us, we can identify only eleven other Swiss Chalet stores open in Ontario at that time; two of those became the subject of certification applications filed by CURRE on October 5th and 9th. That leaves nine stores at which CURRE had neither bargaining rights nor a pending certification application nor an organizing campaign so far advanced that a certification application was imminent. One of those was 2990 Eglinton Avenue East, the subject of Local 254's application. Boyd selected seven of the remaining eight stores. In fairness, evidence presented with respect to store openings was not exhaustive; there may have been some other stores open at the time. Whether there were eight or sixteen or even twenty-four stores at which bargaining rights were not the subject of certificates or certification applications, however, it would be a remarkable and mathematically improbable coincidence that seven stores were selected "at random" without choosing at least one of the fourteen stores at which CURRE had either bargaining rights or a pending certification application.

30. In addition to the coincidence of the locations selected for this supposed random security test, there is also the timing of the decision to conduct it. That decision was contemporaneous with the filing of Local 254's certification application. That timing is meaningful if we take it, as Salisbury was told, that Foodcorp — that is, Boyd — wanted CURRE in at its stores because it preferred CURRE to some other "North American" union. Boyd may have been "paranoid about unions", as one of the witnesses said, and still prefer CURRE over another union with which he was unfamiliar or, at least, prefer to deal with one union rather than two. We conclude that Boyd's instructions to Wilson were that the operatives were to be sent to the seven selected stores to assist CURRE in organizing those stores, and it was as a result of Boyd's instructions to Wilson that Salisbury and Littlefield lent assistance to CURRE in its organizing of Foodcorp's Niagara Falls and Waterloo Swiss Chalet restaurants in October of 1979.

31. There can be no doubt that the services Boyd sought and obtained from Intertec on Foodcorp's behalf constituted a violation of what was then section 56 and is now section 64



of the *Labour Relations Act*, which provides:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

We do not accept the argument of the respondents and interveners that the interference had no effect because employees at both the Niagara Falls and the Waterloo store were ripe for organizing and needed no encouragement. It does seem that the employees at the Waterloo store needed little encouragement; it is not as clear that was true of the Niagara Falls store, which had only just opened shortly before Salisbury arrived. Even if it were true of both stores, a focus on the employees' appetite for collective bargaining ignores the significance of the attempt to co-opt that appetite and focus or steer it in a particular direction. It is impossible to say where and when the employees' unprovoked, unguided interest in collective bargaining might have taken them, had there been no interference. It is impossible to assess what the effect of the uninfluenced exercise by the employees at those locations of their right to choose a bargaining agent might have had on the later exercise of that right by employees at both the other then unorganized locations and the locations that had previously been organized. The interference was no less invidious because the employees were not aware that their employer was attempting to steer them in a particular direction. Indeed, it is far more disturbing that it was covert. Apart from any question of the propriety of an employer's openly preferring a trade union, if it is done openly the employees are at least aware of the perspective and bias of the person expressing the opinion, and can assess how that reflects, if at all, on the desirability of that trade union as his or her bargaining agent in dealing with that employer. When the preference is expressed through the mask of someone who appears to share the employee's interest, that opportunity to critically assess the motivation of the speaker is lost. The *Labour Relations Act* does not countenance such employer subversion; the violation is clear, serious and disturbing.

32. What should our response be to this illegal behaviour? Before answering that question, it is important to review the way in which the issue of this behaviour came before us. It arose as an allegation by the applicant in these certification applications, and was asserted against CURRE, Foodcorp and the other respondent employers. It was raised as an attack on the status of bargaining rights and collective agreements whose existence, as we have found, would otherwise make a number of these applications untimely and in three others preclude certification without a vote in which CURRE's name would appear on the ballot. The applicant asked for reconsideration of the certificates on which those bargaining rights were based, and for a declaration that the SCEA agreement and its predecessor agreements were not "collective agreements" within the meaning of the Act. It also asked for a declaration that Foodcorp had violated section 64 of the *Labour Relations Act*. It asked for no other remedial response to the breach of section 64. It did not name Intertec as a respondent, and sought no remedy against it. We have no jurisdiction to *penalize* either Intertec or Foodcorp for unlawful behaviour as, under the *Labour Relations Act*, *punishment* is in the exclusive jurisdiction of the courts. We also have no jurisdiction in these proceedings to make any order against Intertec, as it is not a party to these proceedings. Natural justice requires that any order affecting any of the respondents or interveners not go beyond the bounds of the case the applicant required them to meet. We turn, then, to that case.

33. The applicant argued that the actions of Foodcorp constituted the contribution by an employer to CURRE of “other support” within the meaning of section 13 of the *Labour Relations Act*. It argued that CURRE had therefore been disentitled to all of the certificates it obtained thereafter, and that all of its subsequent collective agreements, whatever locations they covered, were deemed not to be collective agreements by operation of section 48 of the Act. The applicant argued that we could and should infer from the evidence before us that CURRE was aware of and at least acquiesced in the provision of support to it by Foodcorp. Indeed, it argued that CURRE must have provided Foodcorp with information about its organizing in order to coordinate efforts to support its organizing campaigns.

34. The evidence before us does not establish that CURRE was aware that the persons put in place by Intertec and Foodcorp were anything other than the ordinary pro-union employees they pretended to be, nor that CURRE would have had the slightest inkling that Foodcorp was assisting its organizing efforts in any way. Having regard to the organizing CURRE had already done and the additions to its staff of Cathy Perry and other organizers, Boyd did not need inside knowledge to predict that CURRE would soon attempt to organize the Swiss Chalet restaurants which remained unorganized, or to say to Flinn with some assurance either that a union was in or that a union was coming in, or to tell Wilson, as he must have, that Cathy Perry was the person who was likely to show up at a restaurant trying to organize the employees. The timing of events suggests that Boyd did not know when certification applications would be filed by CURRE. If he had known, it seems unlikely he would have had Intertec send an operative to the Queenston Road store in Hamilton. CURRE filed its application for that location on October 17th. That filing limited the time within which relevant membership evidence could be collected. An Intertec operative did not begin work at that store until October 17, 1979.

35. Counsel for the applicant argued that sections 13 and 48 had the effect he contended for even if CURRE had been unaware of the support it had received. With respect to the issue of “employer support”, the following cases were referred to in argument by one or more of the parties’ counsel: *Edwards & Edwards Limited*, 52 CLLC ¶17,027; *Swift Canadian Co. Limited*, 54 CLLC ¶17,071; *Navco Food Services Limited (Formerly National Automatic Vending Company Limited)*, [1971] OLRB Rep. Feb. 80; *Metal Textile of Canada*, [1971] OLRB Rep. Nov. 694; *Sunrise Paving and Construction Co. Ltd.*, 72 CLLC ¶16,060; *Zehr’s Markets Limited*, [1972] OLRB Rep. June 635; *Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin, et al.*, (1973) 41 D.L.R. (3d) 6 (S.C.C.); *Smith Beveridges Limited*, [1975] OLRB Rep. Dec. 956; *Veres Wire Industry Ltd.*, [1976] OLRB Rep. July 337; *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806; *Municipality of Casimir* [1978] OLRB Rep. Feb. 130; *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525; *Japamco Company Limited*, [1979] OLRB Rep. Feb. 106; *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639; *Tilco Plastics (1976) Limited*, [1980] OLRB Rep. July 1096; *Frusino Structure Inc.*, [1981] OLRB Rep. Mar. 271; *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509; and, *Primo Importing and Distributing Co. Ltd.*, [1982] OLRB Rep. Dec. 1869. None of these cases supports the contention that sections 13 and 48 can apply to support of which the affected union is wholly unaware. Sections 13 and 48 must be interpreted with reference to their obvious purpose, which is:

... to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

(*Edwards & Edwards, supra*).

In *Canada Crushed Stone, supra*, the Board described the purpose of section 13 (then section 12) this way at paragraph 27:

The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section 12 catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances *the union's acceptance of employer support activates the Section 12 bar.*

(emphasis added)

If a trade union's ability to be certified or to enter into binding collective agreements could be destroyed by unsolicited employer behaviour of which the union was totally unaware, sections 13 and 48 would cease to serve as protections from employer interference in employees' selection of a bargaining agent and, instead, become potent instruments for effecting just such interference.

36. We are satisfied that Foodcorp's interference in 1979 did not compromise CURRE's independence in any way which warrants application of sections 13 and 48, either prospectively or retrospectively. In coming to that conclusion, we have considered what effect should be given to Salisbury's evidence that an organizing meeting took place on company premises during working hours. That is the sort of evidence which, if heard and accepted at the time the certification application was before the Board, would have resulted either in the rejection of membership evidence or in the Board's exercising its discretion to order a representation vote, despite a level of membership evidence adequate for certification without a vote. It would not have deprived CURRE of existing rights or prevented it acquiring bargaining rights in other, appropriate, circumstances. We need not decide which of the two indicated possibilities would have been the result, because we do not regard Salisbury's evidence with respect to this alleged overt support as an adequate basis on which to grant reconsideration of five year old certification decisions.

37. In concluding that CURRE has not been shown to be a "company union" of the sort sections 13 and 48 of the Act are meant to neutralize, we should not be taken as making any judgment about the quality of representation CURRE has given Swiss Chalet employees in the past. That is an issue on which the only relevant judgment is that of the affected employees, whose right to select, discharge or change their bargaining agent is at the heart of the *Labour Relations Act*. We should also not be taken as minimizing the seriousness of Foodcorp's behaviour in 1979. The challenge we face, in the circumstances as we find them, is to devise a response that does not further victimize the victims of that behaviour.

38. If we were dealing with a fresh situation, if the interference had come to light before certifications had been granted, then we would not have certified CURRE without a vote, at least in the locations in which it appeared that there had been any interference. That, it seems to us, would have ensured that CURRE became neither the beneficiary nor the innocent victim of Foodcorp's illegal activity. Even if the interference had been discovered early in those first three year collective agreements at locations potentially affected by the interference, we might well have reconsidered the decisions granting certificates, set the certificates aside, returned



to the point at which the Act requires exercise of the discretion to certify with or without a vote, and exercised that discretion by ordering a vote of the then employees to determine whether they wished to be represented by CURRE. Of course, that course of action might have undermined rights accrued under the collective agreement prior to the decision, or at least made those rights uncertain, and to that extent employees might have been disadvantaged by action taken to uphold in principle their freedom of choice. This countervailing factor is even stronger when the rights which might be jeopardized have developed over an extended period of time; this concern has to be balanced against a desire to ensure that current employees have an early opportunity to select a bargaining agent in circumstances in which they are aware of Foodcorp's covert support of CURRE in 1979, and can take that into account along with anything else they feel is relevant in choosing a bargaining agent for the future.

39. We have considered whether, in the exercise of our power to reconsider, we should set aside certificates and order a vote in any of the locations to which applications before us relate. That seems an inappropriate step to take five years after the event, with all that has happened since, especially when we take into account the fact that the employees of Swiss Chalet restaurants, and the trade unions of their choice, have had an opportunity to file timely representation applications since the applicant's allegations were first made. Indeed, the applicant has since September 9, 1984, filed a further certification application with respect to each one of the locations affected by this decision (other than the two which sub-paragraph 32(d) of our September 12th decision determined were the subject of timely UFCW applications). Local 88 has also filed applications with respect to some of those locations. Subject to the effect of section 103(3) where two such applications have been filed at different times with respect to the same location, those timely applications will be processed if the applications before us are dismissed and the original certifications are not reopened. In other words, employees at all of the locations affected by this decision will, we trust, have an early opportunity in those applications to have their wishes tested without jeopardizing any accrued collective agreement rights, and those employees will then be able to determine for themselves what effect, if any, our findings should have on their selection of a bargaining agent.

40. The sole remedy requested by the applicant against Foodcorp in respect of the engagement of Intertec and the activities of Intertec operatives in 1979 was a declaration that Foodcorp had violated section 64 of the Act. We do hereby declare that in October, 1979, Foodcorp violated section 56 (now 64) of the *Labour Relations Act* by engaging Intertec Security & Investigation Limited to place in its stores operatives who, while purporting to be ordinary employees, were to and, at least two of Foodcorp's restaurants, did interfere in its employees' selection of a trade union by promoting membership in and representation by the Canadian Union of Restaurant and Related Employees.

41. In the result, the following applications are dismissed as untimely, but expressly without prejudice to any timely application which the applicant may since have filed:

<u>Board File</u>	<u>Respondent</u>
2628-83-R	Cabral Foods Inc.
2629-83-R	J. Paiva Foods Ltd.
2630-83-R	Manuel Goncalves, Restaurateur, Ltd.
2631-83-R	L.M.L. Foods Inc.
2686-83-R	L. DeSousa Enterprises Ltd.
2688-83-R	F. G. Andrioulo Foods Inc.

2831-83-R	Cara Operations Limited
2964-83-R	Cara Operations Limited
2965-83-R	Cara Operations Limited
0040-84-R	C. Calisto Foods Limited
0128-84-R	William Odorico Investments Ltd.
0129-84-R	G. H. Sousa Holdings Inc.
0144-84-R	Cara Operations Limited
0318-84-R	Cara Operations Limited
0407-84-R	D.N.M. Lau Foods Inc.
0493-84-R	Cara Operations Limited
0922-84-R	Cara Operations Limited
1239-84-R	Cara Operations Limited

42. It follows from our findings that the SCEA agreement was a collective agreement with more than two months left in its term on the date of the application in File No. 1353-84-R, in which M. Jeronimo Investments Inc. is respondent. We have not formally dealt with the question whether that respondent was bound by the terms of the SCEA agreement on the date of the application. On the facts indicated to the Board by its counsel, it would be. We would ask that counsel for the applicant advise the Board, within three weeks of the date of this decision, whether it wishes the respondent put to the formal proof of those facts. If the Board is not so advised within the time frame mentioned, this application will be dismissed on the same basis as the applications referred to in the previous paragraph.

43. It follows from our findings here and in our previous decision that the following five applications must be treated as timely applications in which CURRE has bargaining rights for the affected employees:

<u>Board File</u>	<u>Respondent</u>
2687-83-R	485376 Ontario Limited
2689-83-R	Rahims Food Limited
2829-83-R	555618 Ontario Ltd.
2830-83-R	Famz Foods Limited
0336-84-R	Famz Foods Limited

The Registrar is directed to list those five applications for further hearing. This panel is not seized of any of the issues remaining to be dealt with in those applications.

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**2400-82-R** Communications Workers of Canada, Applicant, v. CTG Telecommunications Systems, Inc. c.o.b. as **Canadian Telecommunications Group**, Respondent

**Bargaining Unit — Certification — Constitutional Law — Employer engaged in business of selling, installing and maintaining telephone and related telecommunications systems — Whether integral part of Bell Canada's acknowledged federal undertaking — Whether within federal jurisdiction as involving "telecommunications" or because operation created by decision of federal regulatory authority — Board determining composition of appropriate unit in "inter-connect" business — Employee spending most of time in representative period outside geographic scope of unit description excluded from count**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Paul Cavalluzzo, Elizabeth J. Shilton Lennon, Hank Goldberg and Tom Richardson for the applicant; E. T. McDermott, J. Hanson, T. Murphy and R. Ryan for the respondent.*

**DECISION OF THE BOARD;** February 14, 1985

1. When this application for certification first came on for hearing, the major dispute between the parties concerned the composition of the bargaining unit, as appears from the following portions of the Board's initial decision in this matter:

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

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4. After some discussion, the parties have reached agreement on a bargaining unit description framed as follows:

"All employees of the respondent in Metropolitan Toronto, save and except supervisors, managers, persons above the rank of supervisor or manager, sales staff, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period."

Clarity Note:

"The term 'supervisor' as used herein does not include project supervisors. Project supervisors are included in the bargaining unit."

5. Despite the parties' agreement on the bargaining unit description, there are substantial disagreement about the actual composition of the agreed bargaining unit. The employer asserted that there were some sixty employees in the bargaining unit, but the union has raised some 29 challenges (3 additions and 26 deletions) to the employee list. . . . Both parties took the position that an examiner should be appointed to inquire into the employee list and the composition of the bargaining unit.

• • •

8. Having regard to the foregoing and the agreement of the parties, the Board hereby appoints a Labour Relations Officer to inquire into the employee list and the composition



of the bargaining unit, including any question of the duties and responsibilities of the employees potentially affected by this application or their community of interest with the employees who will be affected by it.

2. Labour Relations Officers conducted hearings on a number of dates in the months following the Board's initial decision. The Officers' hearings resulted in a report containing 191 pages of transcribed testimony concerning the duties and responsibilities of various employees of the respondent. Copies of the report were provided to the parties in accordance with the Board's usual procedure. Counsel for both parties then wrote to the Board giving notice of their desire to make representations to the Board as to the conclusions it should reach in view of the report. Both counsel requested a hearing for the purpose of making those representations orally. In his letter, counsel for the respondent also, and for the first time, challenged this Board's jurisdiction to deal with this application, taking the position "that The Constitution Act, 1981 (formerly the British North America Act) [sic] places the Respondent's labour relations under the legislative authority of the Federal Parliament . . ." Evidence and argument with respect to the latter issue occupied two days of hearing before the Board; argument with respect to the composition of the bargaining unit occupied a third day of hearing.

3. Evidence of the nature of the respondent's operations is before us in two forms. The report of the Board's Labour Relations Officers contained a transcription of the testimony of several witnesses whose evidence had been taken for the purpose of resolving the parties' dispute about the composition of the bargaining unit. One of those witnesses was Thomas Murphy, who was the respondent's Director of Operations at the time this application was filed. While testimony before the Board's Officers dealt at length with the nature of the respondent's operations in the Municipality of Metropolitan Toronto and surrounding areas, it was not taken or offered with a view to the constitutional law issue later formulated by the respondent. At the opening of the hearings before this panel of the Board, the respondent recalled Mr. Murphy, now the respondent's Vice-President of Operations, to give *viva voce* evidence concerning the respondent's operations from the perspective of the constitutional law issue. The parties agreed that the transcribed testimony could also be relied upon in resolving this issue, but the *viva voce* evidence was to be preferred if there was any conflict between the two.

4. CTG is an "interconnect company". It sells, installs and maintains telephone and related telecommunications systems. CTG does not itself manufacture telephone or telecommunications hardware. The systems CTG sells are assembled with equipment it purchases from various manufacturers. CTG's customers are business subscribers of those telecommunications common carriers (telephone companies) who now permit the attachment of customer provided terminal equipment to their telephone and telecommunications networks. The customers served by the portion of CTG's business which is the subject of this application are subscribers of Bell Canada, a federally regulated telecommunications common carrier.

5. In November, 1979, Bell Canada filed with the Canadian Radio-Television and Telecommunications Commission ("the CRTC") an application "intended to bring before the Commission the question of whether the liberalization of the rules regarding the connection to Bell's facilities of subscriber-provided terminal devices, and particularly network-addressing terminal devices, was in the public interest and should be allowed." (See Telecom Decision CRTC 82-14, Canada Gazette Part I December 4, 1982, p. 9067 at 9068.) In an interim decision dated August 5, 1980 (Telecom Decision CRTC 80-13, Canada Gazette Part I, p. 4937), the CRTC dictated the way Bell Canada was to respond to such interconnect requests pending the Commission's final determination of the issues raised by Bell's application. On November 23, 1982, the CRTC issued a final decision dealing with Bell Canada's application and similar

applications concerning other federally regulated telecommunications carriers (see Decision CRTC 82-14, *supra*). The approach taken in the interim decision was substantially confirmed in the final decision, with differences not material to our inquiry. Both decisions required that Bell adopt a more liberal approach to the connection to its facilities of subscriber-provided network addressing terminal devices (telephone handsets and private branch exchange equipment, *inter alia*). Bell Canada must permit a customer to connect such devices to the Bell network if the customer provides to Bell satisfactory proof that the equipment complies with certain technical requirements. The CRTC decisions prescribe a form of agreement between Bell and the interconnecting customer, setting out their respective obligations with respect to the installation and operation by the customer of its terminal equipment. These decisions represented the point of departure for a new industry, in which private suppliers of terminal equipment competed for the attention of those Bell subscribers who wished, or could be persuaded, to exercise their right to attach to Bell's telephone lines terminal equipment purchased from these entrepreneurs. The business of these new "interconnect companies" is not limited to the sale of discreet pieces of telephone hardware. They also offer advice and assistance in selecting the terminal equipment, customizing it to the customer's requirements and installing it on the customer's premises. In addition, they offer assistance and expertise in dealing with Bell Canada, both in satisfying the subscriber's obligations under the interconnect agreement contemplated by the CRTC decisions, and in choosing from among the many different telephone services offered by Bell Canada. One of Bell's affiliates, BCSI, offers similar services and competes with CTG and others in the new "interconnect" market. Subscribers can still rent terminal equipment from Bell, but Bell cannot require them to do so as a condition of gaining access to Bell's telephone network.

6. CTG offers a variety of telephone systems. The simplest are the "key" systems, in which incoming lines are connected directly to the telephone handsets, so that the user of a handset selects a particular Bell line by pushing one of the buttons on the handset. The more sophisticated "PBX" (private branch exchange) systems have at their heart an electronic switchboard which regulates and facilitates use of those individual telephone handsets which make up the customer's own internal telephone system. Calls can be placed from one handset to another or others within the customer's system and, subject to any restrictions which may have been incorporated into the system, any handset in the system can access any of the network lines connected to the system. If the customer has access to a variety of different telephone network services, and perhaps even to different telecommunications networks, some systems sold by CTG can be programmed to determine which of the outgoing lines will be used for any particular type of outgoing call, so that the most effective and economic use is made of the services to which the customer subscribes. Elements of a customer's telephone system may be located in more than one building occupied by the customer. If the customer owns the property under and between the buildings, those elements of its internal telephone system may be connected by cable or, as in one installation referred to by Mr. Murphy, by microwave equipment sold by CTG. If customer locations do not abut, the separated elements of the customer's system may be connected by a dedicated telephone line or "tie-line" rented from Bell.

7. The CTG employees affected by this application are employed by CTG in its Ontario Region operations department. In the organization of CTG's workforce, "operations" is a function distinct from sales, finance, human resources and head office administrative functions. At the risk of over-simplification, it may be said that the operations department supplies and services whatever the sales department sells. For the most part, the involvement of the operations department commences after a sale has been made to a customer. An exception to this involves



a group of employees in the operations department known as technical support representatives (“TSRs”). They have several functions. One function is the dissemination within the company of technical information concerning equipment the company offers for sale to customers. Another is to prepare the “pre-design” and site survey for a system being offered to a potential customer. The TSR’s focus in relation to a system proposal is on whether it will be possible for the operations department to make the product promoted by the salesman do what the customer wants it to do, having regard to any limitations inherent in the proposed location of the equipment or the nature of the equipment itself. The TSR’s involvement at the pre-sale and sale stages is regarded by the operation’s department as its “check and balance” on sales personnel.

8. Once CTG’s sales force sells a system to a new customer, an operations department installation team takes over. The installation team consists of one or more each of “design reps”, “project supervisors” and “customer service reps” (CSRs). A design rep takes the pre-design work done by the TSR and works out detailed floor plans, showing the precise location of system components, and key sheets showing which telephone lines will be operative on which handsets or handsets buttons. In many cases, the functions of the telephone systems sold by CTG are determined or customized by programming them in the same sense as one speaks of programming a computer. One of the functions of the design rep is to determine what programming will be needed in order to give effect to the customer’s specific requirements. Another of the design rep’s functions is to work with the “operations co-ordinator” in preparing a package of information (the “CPEG Package”), which must be supplied to Bell in support of the interconnection of the installed system to the Bell network.

9. The project supervisors’ functions relate primarily to the physical aspects of the installation. The project supervisor takes the design from the design rep and lays out course sheets showing where a telephone cable must go in order to connect the various components which make up the system to be installed. The respondent’s practice on new installations is to sub-contract the actual installation of cable. The project supervisor co-ordinates both that sub-contract work and the balance of the physical equipment installation performed by CTG’s technicians.

10. The CSR’s role in the installation team is to train the customer in the use of the system once it is installed. CSRs and design reps have similar training and expertise. Indeed, at an earlier stage in CTG’s development, the design rep on a CTG installation was also responsible for customer training. Before the application date, however, CTG set CSRs off as a separate group whose focus was on continuing customer contact, both during and after the installation of a system. CSRs have responsibilities which may bring them back into contact with a customer after an installation and its associated customer training are complete.

11. The time taken to install a system depends on the nature of the system to be installed. Taking into account the range from the smallest electronic key installation to the largest PBX installation, installation time for a new system can range from two weeks to six months. The evidence suggests that a typical installation involves several weeks work before any step is taken to connect the customer’s new telephone system to the Bell network.

12. There is reference throughout the transcribed and *viva voce* evidence to the “Bell Network Package”, “customer provided equipment package” or “CPEG package”. These all refer to a package of information which must be supplied to Bell before a customer’s terminal equipment can be connected to the Bell network. This documentation tells Bell the number



and types of telephone lines the customer wishes to rent from Bell. It also gives Bell technical information about the terminal equipment the customer proposes to connect to those lines information a customer is obliged to supply in order to satisfy the requirements which the CRTC has authorized Bell to impose in response to an interconnection request. CTG acts as its customer's agent in preparing and transmitting this material to Bell. The person at CTG who does this work in connection with new installations is the operations co-ordinator. She co-ordinates with Bell approximately 60 CTG projects per month. In addition to providing Bell with the CPEG package, the operations co-ordinator also arranges with Bell the scheduling of the "cut-over" of the new installation. In the jargon of the industry, "cut-over" describes the actual physical and electrical interconnection of the new installation with Bell network lines. Under the rules established by the CRTC, it is Bell's responsibility to bring the necessary lines to an agreed-upon point within the customer's premises, a point referred to by Mr. Murphy as the "d-mark". This is the point described in the CRTC's interim decision (CRTC 80-13, *supra*, at 4948) as the "interface point", and in the final decision (CRTC 82-14, *supra*, at pp. 9083 and 9085) as the "point of demarcation" between the carrier's facilities and the customer-supplied equipment. Bell technicians bring the Bell lines to that point prior to the pre-arranged "cut-over" time. CTG's forces bring corresponding cables from the new installation to the "d-mark". At the pre-arranged time, with representatives of both Bell and CTG present, the new installation is "cut-over" by plugging the customer's cables and Bell's cables together. While the CTG installation will have been tested in a preliminary way prior to "cut-over", this is the first time at which its ability to function in conjunction with the Bell network can be assessed. If there is any difficulty, the concern of the Bell and CTG representatives is to ascertain whether the fault lies in Bell's lines or in the equipment supplied by CTG. If CTG is also installing or has installed equipment for the customer at another location, the ability of the two locations to communicate with one another over Bell's lines may be tested once the installations are "cut-over". By way of example, Mr. Murphy testified that CTG has supplied equipment to a customer at locations in Ontario and Quebec, and that the ability of Ontario based equipment to communicate with Quebec based equipment had been the subject of tests conducted by CTG over Bell's lines. The time taken in the actual "cut-over" is brief compared to the time spent installing the system prior to "cut-over".

13. CTG requires that its customers contract with it for ongoing servicing of the installation it sells. This involves a service contract which takes effect once the initial warranty period expires. One of the employees affected by this application is the Service Contract Administrator. Her function is to review each service contract when the initial one-year warranty on a new installation expires. She does a physical audit of installations which are the subject of CTG repair contracts, in order to ensure that the equipment on site corresponds with the equipment described in the service contract. CTG also enters into service contracts with respect to systems installed by other companies. In those cases, the Service Contract Administrator performs the initial physical audit of the customer's premises and checks also to see that the installation is up to CTG's technical standards.

14. When a customer has difficulty with its equipment, the first question is whether the difficulty is with Bell's lines or with the equipment purchased from CTG. Neither Bell nor CTG has either the obligation or the authority to repair equipment supplied by the other. More often than not, the fault lies in the equipment supplied by CTG. If the needed repairs cannot be effected by linking CTG's diagnostic and repair equipment to the customer's equipment over the telephone lines themselves, a CTG dispatcher dispatches a CTG repair technician to deal with the service problem.

15. Changes in the needs or business locations of CTG's customers can result in what CTG describes as "moves, adds and changes". A customer may wish to change the location, number or type of telephone handsets connected to its PBX switchboard. It may wish to add to or change the number or type of Bell trunk lines accessed by its terminal equipment. It may move its offices within a building or from one building to another. In each case, the customer requires the assistance of CTG in moving, adding to or changing its telephone system. When a CTG customer requests a move, add or change, the request is normally directed to an operations department employee known as a Telco Co-ordinator. If the request involves programming or re-programming equipment, the Telco Co-ordinator may do the programming herself. If a technician or customer service representative is necessary, the Telco Co-ordinator arranges for one to be dispatched. If the move, add or change involves a change in the Bell interconnection, the Telco Co-ordinator writes the necessary CPEG Package and arranges with Bell for the "cut-over" of the new services. A move, add or change may be as involved as an initial installation. The installation aspect of a move, add or change is handled in a manner similar to new installations, except that CTG may use its own technicians to perform cable installation on smaller projects.

## THE CONSTITUTIONAL ISSUE

16. The most appropriate starting point for an examination of this issue is the following passage from the judgement of Mr. Justice Dickson (as he then was) in *Northern Telecom Ltd., v. Communications Workers of Canada et al.*, (1979), 98 D.L.R. (3d) 1, 28 N.R. 107 ("Northern Telecom No. 1") at pages 13 to 15 D.L.R., 123 to 127 N.R.:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise . . .

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, *Re Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 20, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

• • •

Any core federal undertaking present in this case must be found within the telephone and telecommunications system. Constitutional jurisdiction over telecommunications is a difficult and controversial subject. It is a field which has been the subject of no little academic comment: see *Telecommunications and the Federal Constitution of Canada* by W. R. Lederman in H.E. English, ed., *Telecommunications for Canada, An Interface of Business and Government* (Toronto; Methuen, 1973); Mullan, *Attainment of Objectives and Jurisdiction* in Janisch, ed., *Telecommunications Regulation at the Crossroads* (Dalhousie Continuing Legal Education Series, No. 13, 1976), 149; *Analysis of the Constitutional and Legal Basis for the Regulation of Telecommunications in Canada*, Study 1(a), The Department of Communications (1971); Colin H. McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction", 47 Can. Bar Rev. 355 (1969). Two recent judgments of this Court have dealt with constitutional jurisdiction in respect of certain aspects of telecommunications: see *Capital Cities Communications Inc. et al. v. C.R.T.C.* (1977), 81 D.L.R. (3d) 609, [1978] 2 S.C.R. 141, and *Re Public Service Board et al. Dionne et al. and A.-G. Can. et al.* (1977), 83 D.L.R. (3d) 178, [1978] 2 S.C.R. 191, 18 N.R. 271.

At a minimum, it can be asserted that Bell Canada's operations have been found to be a federal undertaking: see *City of Toronto v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (J.C.P.C.) and *Commission du Salaire Minimum v. Bell Telephone Co. of Canada* (1966), 59 D.L.R. (2d) 145, [1966] S.C.R. 767.

In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article, *supra*, at pp. 380-1.

A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.

McNairn's comment is borne out by the cases. On the one hand, a single enterprise may entail more than one undertaking, e.g., Canadian Pacific Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in *C.P.R. Co., v. A.-G.B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R.



220 *sub nom. Reference re Application of Hours of Work Act, etc.* On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in stevedores employed by a stevedoring company loading and unloading ships in the “*Stevedoring case*”, *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, or a trucking company which did 90% of its business for the Post Office in *Letter Carriers’ Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452.

Another, and far more important factor in relating the undertakings, is the physical and operational connection between them. Here, as the judgment in *Montcalm, supra*, stresses, there is a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.

17. The respondent argues that the systems it sells become an integral part of Bell’s telephone network, an acknowledged federal work or undertaking. Because it supplies, installs and, particularly, maintains such systems, CTG argues that its operations are an integral part of the core federal undertaking — the Bell Canada network — and its labour relations are, therefore, removed from provincial jurisdiction in accordance with the principles referred to in the above-quoted passage from the judgment of Mr. Justice Dickson in *Northern Telecom No. 1*. On this branch of the respondent’s argument, submissions of counsel for both parties focused on the several cases in which the courts have assessed constitutional jurisdiction to regulate labour relations between Northern Telecom Canada Ltd. and its predecessors on the one hand, and various groups of its employees on the other: *Regina v. Ontario Labour Relations Board, Ex. parte Dunn*, [1963] 2 O.R. 301 (Ont. H.C.); *Regina v. Ontario Labour Relations Board, Ex. parte Northern Electric Co. Ltd.*, [1970] 2 O.R. 654, 11 D.L.R. (3d) 640 (Ont. H.C.); *Re Northern Electric Co. Ltd., and United Steelworkers of America, Local 8001*, (1972) 25 D.L.R. (3d) 368 (Que. C.A.); *Northern Telecom Ltd., v. Communications Workers of Canada et al.*, (1979) 98 D.L.R. (3d) 1, 28 N.R. 107 (S.C.C.) (“*Northern Telecom No. 1*”); and, *Re Communications Workers of Canada et al. and Northern Telecom Canada Ltd.*, (1981) 123 D.L.R. (3d) 483 (F.C.A.), upheld *sub. nom. Northern Telecom Canada Ltd. et. al v. Communications Workers of Canada et al. and Canada Labour Relations Board*, (1983) 147 D.L.R. (3d) 1, 48 N.R. 162 (S.C.C.) (“*Northern Telecom No. 2*”). On this branch of its argument, counsel for the respondent also cited *Commission du Salaire Minimum and the Bell Telephone Company of Canada*, [1966] S.C.R. 767 (S.C.C.) and *Reference Re Validity of Industrial Relations and Disputes Investigation Act (Can.) and Applicability In Respect of Certain Employees of Eastern Canada Stevedoring Co. Ltd.* [1955] 3 D.L.R. 721 (S.C.C.) (“the *Stevedoring case*”), while counsel for the applicant referred to *Canada Labour Relations Board and Attorney General of Canada v. Paul L’Anglais Inc., J. P. L. Productions Inc., Canadian Union of Public Employees et al.*, (1983) 47 N.R. 351 (S.C.C.).

18. Quite apart from the nature of its connection to or relationship with Bell Canada and its telephone network, the respondent argued in the alternative that its operations by their nature alone fell within exclusive federal jurisdiction, either because they could be described as involving “telecommunications” or because the industry in which it was engaged was brought into existence by a decision of a federal regulatory authority. On the “telecommunications” branch of this alternative argument, the respondent referred to *In Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.) (“the *Radio Reference*”) and to decisions respecting constitutional jurisdiction over cable television enterprises: *Re Public Utilities Commission and Victoria Cablevision Ltd.*, [1965], 51 D.L.R. (3d) 335 (B.C.C.A.)

and *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al.* [1978] 81 D.L.R. (3d) 609 (S.C.C.).

19. We propose to review the respondent's main and alternate arguments separately, beginning with the alternate argument: that the nature of CTG's enterprise makes it a federal work or undertaking, whatever its connection or relationship with Bell's federal undertaking may be. This argument rested on two bases, the first of which was that the regulation of CTG's undertaking must fall exclusively within federal jurisdiction because the interconnect industry came into being as a result of the decision of a federal regulatory agency and because in the pursuit of that business CTG must be mindful of standards set by that agency with respect to the technical requirements equipment must satisfy in order to be connected to the Bell network. Counsel cited no authority for this approach. We can find none. Indeed, there are decisions which clearly reject it.

20. The business of a customs broker is one which would not exist but for customs and excise legislation, matters within federal jurisdiction. It is necessary to obtain a license from the federal taxation authorities in order to act as a customs broker. The day-to-day aspects of the undertaking of a customs broker are greatly influenced by extensive federal regulations. In the course of this business, a customs broker regularly collects and remits taxes to Revenue Canada. In *Kuehne & Nagel International Ltd.*, [1979] 1 Can. L.R.B.R. 156, the respondent customs broker disputed the jurisdiction of the B.C. Labour Relations Board on the basis that the factors just recited brought its operations within federal jurisdiction for all purposes, including labour relations. The B.C. Board rejected that argument. In its reasons it cited *Re James Enterprises Ltd., and Manitoba Labour Board*, [1971] 21 D.L.R. (3d) 1 (Man. Q.B.), which held that the comprehensive federal supervision of the pari-mutuel system associated with an employer's race track business did not exclude the application of provincial labour legislation to that employer and its employees. The B.C. Board had this to say at page 167 of its decision:

To appreciate the proper effect of this close supervision by Parliament of the customs brokerage business, it is of assistance to return again to the decision in *Re James Enterprises*. After reciting the detailed and extensive nature of the federal supervision of the operation of the pari-mutuel betting system, Wilson J. goes on to say:

I cannot agree, because of the federal power of supervision to that extent, the minister's control over the affected employees must extend to wages, hours of work, holidays and the many other matters ordinarily associated with the notion "conditions of employment".

(at page 9)

Following an examination of several authorities, the judgment concludes with this observation:

But of the instant case, the terms and conditions of employment of these employees is a matter quite apart from compliance with the federal regulations in question, nor are they to be regarded as a "facet" of the supervision deemed necessary to police the observance of those regulations. And so, provincial legislation touching upon such matters as wages, hours of work and the like have an "independent constitutional value" which persists unaffected by the existence of other (federal) rules not in conflict, and having another purpose to serve.

(at page 12)

The reference in this passage to the “independent constitutional value” of the employment relations in question in that case is, of course, a reference to the oft-quoted passage from Laskin’s *Canadian Constitutional Law* which was set out in Part III of this decision:

... Insofar as such relations have an independent constitutional value they are within provincial competence . . . .

With very few specific exceptions which flow out of certain heads in Section 91 of the B.N.A. Act, the employment relations in all service industries have an independent constitutional value and are thus provincially regulated. The small number of exceptions are typified by Parliament’s legislative authority over banking. In that particular service industry, employment relations do not have an independent constitutional value; rather, they are but a facet of the banking industry over which Parliament has the exclusive legislative authority by virtue of head 15 of Section 91. But it is a mistake to assume that because a service offered by an employer relates to or is somehow connected with a branch of the Federal Government, the employment relations of that employer lose their independent constitutional value. If that were so, then an employer whose employees offer counsel or advice in relation to Federal income tax laws and, to carry the analysis to its absurd extreme, a lawyer offering advice and legal services to clients in relation to all manner of federal agencies and programs, would be subject in their employment relations to the Canadian Labour Code. The point is that the services offered by such employers, like the services offered by a custom-house broker, are extended and provided to the public. The services are not conceived nor made available for the purpose of becoming or being an indispensable cog in the great wheel of the Federal Government; the Federal Government is quite capable of carrying on its functions in the absence of the employers and their employees who may earn a livelihood by assisting members of the public in their relations with the Government.

In my view, the employment relations of custom-house brokers do have an “independent constitutional value” and as such are within the competence of the provincial legislature. This branch of the objection to this Board’s jurisdiction therefore fails.

The “oft-quoted passage from Laskin’s *Canadian Constitutional Law*” referred to in this passage is the one quoted by Mr. Justice Dickson, as he then was, in the earlier quoted passage from his judgment in *Northern Telecom No. 1*.

21. As for the “but for” argument that CTG would have no business but for the CRTC’s decisions, we observe that the link between CTG’s business and federal decision making is certainly no stronger than the link on which the respondent customs broker relied in *Kuehne & Nagel International Ltd.*, *supra*. Unlike that respondent, CTG does not require the permission of a federal authority to engage in its business. If this branch of CTG’s alternate argument had any validity, the customs broker in *Kuehne & Nagel* had a stronger case for its application. We think the customs broker’s argument was properly rejected in that case (see also *Pacific Customs Brokers Ltd. v. Office & Technical Employees’ Union et al.*, [1980] 4 W.W.R. 587, 80 CLLC ¶14,022 (B.C.S.C.), reviewed *infra*). We reject CTG’s similar argument here.

22. The respondent’s other submission in support of its alternate argument is that by engaging in “telecommunications” or an aspect of “telecommunications”, all aspects of CTG’s enterprise become the subject of exclusive federal jurisdiction. This argument focused on the Privy Council decision in the *Radio Reference*, *supra*, which dealt with the extent of federal authority over radio communication, and on *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al.*, (1978) 81 D.L.R. (3d) 609, which dealt with the extent of federal jurisdiction over the activities of cable television systems.

23. In the *Radio Reference* case the Privy Council dealt with, *inter alia*, an argument that while regulation of radio transmitters might necessarily be a matter for federal jurisdiction,



the same could not be said of receivers. Their Lordships noted that section 92(10) of the *B.N.A.* (now the *Constitution Act, 1867*), when read together with section 91, assigned to Parliament exclusive jurisdiction over "... telegraphs and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province." Their Lordships concluded (pages 314-316) that:

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

• • •

Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province." But further, as already said, they think broadcasting falls within the description of "telegraphs". No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph," as given in the Oxford Dictionary, is: "An apparatus for transmitting messages to a distance, usually by signs of some kind." Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. . . .

CTG argues that the relationship of a telephone network and the terminal equipment attached to it is analogous to the relationship between radio transmitters and radio receivers, and that if the network is "under the control of the Dominion", then the terminal equipment must share its fate.

24. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission et al.*, *supra*, it was admitted that Federal Parliament had exclusive jurisdiction to regulate the reception by cable television systems of Hertzian waves. The issue was whether the local retransmission of those signals over cables, and the content of the retransmitted matter, could also be the subject of federal regulation. The majority held that the denial of jurisdiction over content would be a denial of any effective jurisdiction over reception at all. It noted that the retransmitted signals were the same ones viewers could intercept with their own receiving apparatus, and concluded (at page 623) that:

. . . it would be incongruous, indeed, to admit federal legislative jurisdiction to the extent conceded but to deny the continuation of regulatory authority because the signals are intercepted and sent on to ultimate viewers through a different technology. Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.

CTG argues that the equipment it installs and maintains is in a position analogous to that of cable television systems in its retransmission aspect. Counsel for the respondent argues that the telephone network cannot exist without the terminal equipment supplied by CTG, that the delivery of telephone communication cannot be divided into parts and that its terminal equipment, like the receivers, dealt with in the *Radio Reference* and *Capital Cities* cases, must be subject to the same jurisdiction as the telephone network or transmitter.

25. *Re Public Service Board et al., Dionne et al. and Attorney General Canada et al.*, (1978) 83 D.L.R. (3d) 178 (S.C.C.) was released on the same day as the *Capital Cities* decision. It also dealt with the subject of constitutional jurisdiction to regulate cable television stations and their programming. In that case, the Supreme Court of Canada rejected an argument for divided control over aspects of television broadcasting and receiving, holding that:

... where television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide. In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. ...

However, the majority also said:

... The suggested analogy with a local telephone system fails on the facts because the very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on their ability to receive and transmit such signals to their subscribers. ...

The majority decision does not say what the “suggested analogy” was, and it is not clear whether that reference is a response to the remarks of Mr. Justice Pigeon at page 184 and other points in his dissenting judgement. The reference, however, does invite caution in analyzing telephone matters by analogy with broadcast matters. If the court in this case was able, even in passing, to append the word “local” to the words “telephone system”, it may at least suggest that telephone systems are not federal or non-local merely because they are telephone systems.

26. Even if it were not of doubtful validity, the analogy with radio communication and cable television enterprises would still be unhelpful in this case. In considering the Privy Council decision in the *Radio Reference*, for example, no one would seriously suggest that the reference to the necessity for ears, even deaf ones, stands as authority for exclusive federal jurisdiction over all of the activities of those who possess ears. Obviously, there is some limit along any line of interprovincial communication beyond which any continuing federal aspect does not exclude all provincial jurisdiction. Again, it could not seriously be suggested that federal legislative competence in the field of radio and television broadcasting and the incidental power to regulate matters involving radio and television receivers results in exclusive federal jurisdiction over the labour relations of those who receive radio and television signals on their private radio or television sets. Of course, if one is to apply the proposed analogy accurately, then it should be noted that CTG is not in a position analogous even to the listener or viewer, the recipient or user of the television or radio signals, but only to that of a supplier, installer and repairer of radio or television receivers. The logic of the *Radio Reference* and *Capital Cities* decisions does not require that the labour relations of television repairmen (that is, those who repair television *receiving* sets) must fall within exclusive federal jurisdiction. Even if valid, the analogy contended for by CTG offers nothing more than the potential for federal regulatory authority over the equipment supplied by CTG and its use, and could not alone support exclusive regulatory authority over all aspects of CTG’s business, including its labour relations. Those labour relations do not lose their independent constitutional value merely because CTG’s product, and the use of that product by CTG and others, might be the subject of federal regulation.

27. We conclude that, apart from any effect its relationship with the Bell network may have, there is nothing in the nature of CTG's business which would exclude provincial jurisdiction over its labour relations. We turn, then, to CTG's main argument: that its operations are so "vital", "essential" or "integral" to those of the Bell network that it must be regarded for constitutional purposes as a part of a federal undertaking which has the Bell telephone network at its core.

28. Northern Telecom is a corporate relative of Bell. For years, it has developed and manufactured equipment purchased by Bell and incorporated into its telephone network. Northern Telecom installers have been involved in installing and testing that equipment for Bell on Bell premises. There is a long history of litigation over whether Northern Telecom's labour relations, particularly with its installers, fall within federal or provincial jurisdiction. Counsel for both parties to this application dealt at length with the various decisions which wrestled with that question. Before reviewing those cases, it would be useful to examine some other relevant jurisprudence.

29. In the passage from *Northern Telecom No. 1* quoted in paragraph 16 above, Mr. Justice Dickson summarized the principles set out in the following passage from the judgement of Mr. Justice Beetz in *Montcalm Construction Inc., v. Minimum Wage Com'n et al* (1978) 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754 at pages 652-653 D.L.R., 768-769 S.C.R.:

The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider*, (1925) A.C. 396. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *In the matter of a reference as to the validity of the Industrial Relations and Disputes Investigations Act*, [55 CLLC ¶15,223], 1955 S.C.R. 529 (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one; *In the Matter of a Reference as to the application of the Minimum Wage Act of Saskatchewan to an employee of Revenue Post Office*, 1948 S.C.R. 248 (the *Revenue Post Office* case); *Commission du Salaire Minimum v. The Bell Telephone Company of Canada*, 1966 S.C.R. 767 (the *Bell Telephone Minimum Wage* case) [66 CLLC ¶14,154]; *The Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [73 CLLC ¶14,190], (1975) 1 S.C.R. 178 (the *Letter Carriers'* case). The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in *Canada Labour Relations Board, Public Service Alliance of Canada v. City of Yellowknife*, [77 CLLC ¶14,073], (1977) 2 S.C.R. 729 at 736. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", (Martland, J. in the *Bell Telephone Minimum Wage* case at p. 772), without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity: *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrieres*, (1969) S.C.R. 851 (the *Agence Maritime* case); the *Letter Carriers'* case.

The issue in *Montcalm Construction Inc. v. Minimum Commission et al.* was whether provincial employment standards legislation in the Province of Quebec was applicable to the employment of workers employed by a building contractor who, under contract with the Crown in



Right of Canada, was building runways at the Mirabel Airport. Seeking to avoid the application of that legislation, the contractor argued that because the operation and maintenance of an airport are aspects of aeronautics, a subject within exclusive federal legislative authority, then construction of an airport must equally fall within federal authority. The majority judgment rejected that argument:

The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission: the *Johannesson* case; *Corporation of the City of Toronto v. Bell Telephone Company of Canada*, (1905) A.C. 52; the result in *Ottawa v. Short and Horwitz Construction Co.* (1960) 22 D.L.R. 247 can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from the legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics: see *Regina v. Beaver Foundations Ltd.* (1968) 69 D.L.R. 649 and *Regina v. Concrete Column Clamps (1961) Ltd.*, *Regina v. Louis Donolo Inc.*, [1972] 1 O.R. 42. See also *Re United Association of Journeymen, etc. Local 496 and Vipond Automatic Sprinkler Co. Ltd.*, (1976) 67 D.L.R. (3d) 381, where Cavanagh J. of the Alberta Supreme Court held that "the fact of construction of a building called an air terminal does not . . . show that the construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations legislation. In my opinion what wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business. . . .

The distinction between the construction of a federal work or undertaking, on the one hand, and the operation or maintenance of it, on the other, arose also in *Northern Telecom No. 2*, as we note later.

30. In *Canadian Airline Employees' Association v. Wardair Canada (1975) Ltd.*, (1979) 2 F.C. 91, 97 D.L.R. (3d) 38 (F.C.A.) the issue before the court was whether the Canada Labour Relations Board had wrongfully declined jurisdiction to entertain an application for certification with respect to customer representatives employed by the respondent International Vacations Ltd. ("Intervac"), when it concluded that Intervac's operations were not a federal work, undertaking or business. Intervac was a corporate relative of the respondent Wardair, which was a federally regulated air carrier then restricted by regulation to wholesale chartering of its seating capacity to tour operators. Intervac was a tour operator. It chartered a large portion of Wardair's seating capacity and sold it both through travel retailers and directly to the public by means of the customer representatives who were the subject of the application before the C.L.R.B. The Federal Court of Appeal summarized the applicable law (at pages 42 and 43 D.L.R., 95 to 97 F.C.) in this way:

Where there is a work, undertaking, or business in relation to which Parliament has legislative authority in the field of labour relations, a problem arises as to where the line is to be drawn between areas in respect of which Parliament can so legislate and other areas in respect of which labour legislation falls in the provincial domain. Certain of the cases where this type of problem arises may be classified as follows:

- (a) where an essential component of operating a federal work, undertaking or business is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating their activities;

(The word "essential" is used here and in the balance of these reasons to include the extended meaning of "reasonably necessary".)

- (b) where an essential component of operating a federal work or undertaking is carried on at a location physically remote from the work or undertaking;
- (c) where fringe operations, reasonably incidental to a federal work, undertaking or business are carried on by the operator thereof as an integral part of the operation thereof, even though they are not essential to its operation; and
- (d) where a person other than the operator of a federal work, undertaking or business carries on activities that are not essential to the operation thereof but could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

These different classes of problem call for further comment.

With reference to class (a), when the essentials of operating a work, undertaking or business within the federal field are carried on in part by one operator and in part by another, the employees of both fall within the federal legislation field. This can be deduced from the *Stevedoring Reference*, *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, to the Supreme Court of Canada. See also *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452; *Butler Aviation of Canada Ltd., v. Int'l Ass'n of Machinists & Aerospace Workers*, [1975] F.C. 590, 12 N.R. 271, and *Holmes Transportation (Quebec) Ltd., v. Transport Drivers, Warehousemen & General Workers, Local 106*, [1978] 2 F.C. 520, 20 N.R. 351.

The problem in class (b) is like the problem in class (a). Where part of the essentials of operating a federal work or undertaking are carried on at a place physically remote from the work or undertaking, the employees at such a remote place nevertheless fall within the federal field. This is involved in what was decided by this Court last December in *C.S.P. Foods Ltd., v. Canada Labour Relations Board et al.* (No. A-201-78 [25 N.R. 91]).

A more difficult problem arises in connection with classes (c) and (d). *A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation.* For example, an inter-provincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, *where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation.* Compare the decision of the Supreme Court of Canada in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] S.C.R. 754, 25 N.R., 1, that was delivered last December.

To sum up with reference to classes (c) and (d), as I understand the law, where something is done as an integral part of the operation of a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not *essential* to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.

(emphasis added)

The Court concluded that Intervac's business was not federal in nature, holding (at p. 44 D.L.R., 98 F.C.) that:

... In my view, its position, as between the air carrier and the passengers, is not different, from a constitutional point of view, from the position of any ordinary travel agency. For the reasons given in *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 171, 11 N.R. 606, for holding that persons performing services for a freight forwarder are not employed on or in connection with the railway by which the forwarder carried out its engagements with its customers, I am of the view that persons employed by Intervac as "customer representatives" are not employed on or in connection with air carrier undertakings by whose aircraft Intervac's customers are carried.

As indicated, the only relevant business or undertaking for carrying passengers by air was that carried on by Wardair or some other charter operator. The real difference, from a constitutional point of view, between what was done by Intervac and what was being considered in the *Stevedoring Reference*, *supra*, is that the stevedoring companies there in question were performing on behalf of the carrier an essential part of the carrier's "shipping" contracts, namely, receiving and loading on the ships the goods to be carried and unloading such goods from the ships and delivering them to the consignees. Those operations were an essential part of what was involved in carrying goods by sea, i.e., "shipping". Intervac's customer representatives perform no comparable part of the air carrier's activity of carrying passengers by air.

31. The decision of the Federal Court of Appeal in *Wardair* refers to that court's earlier decision in *Re Cannet Freight Cartage Ltd., and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, where that court considered the position of another enterprise interposed between a federal undertaking and its customers. In *Cannet* the enterprise in question was that of a freight forwarder, which solicited freight from customers and arranged with the Canadian National Railway ("C.N.") for transportation of the freight in carload lots. Cannet employees worked in premises leased from C.N., where they loaded the freight collected by their employer into freight cars provided by C.N. Cannet made all the arrangements with the customers and C.N., and arranged for unloading and delivery of the freight when it reached its destination on the railway line. The Federal Court of Appeal did not agree with the submission that Cannet's employees were, in these circumstances, employed "on or in connection with the operation of an interprovincial railway", so as to bring them within the ambit of the Canada Labour Code:

In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed "upon or in connection with" the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament's powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that



man's purely local operation, requires that he perform a large part or all of his services physically on the railway's right of way or rolling stock.

For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employees of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or in connection with their employer's business and would not *pro tem* become railway workers.

When the problem in this case is so approached, in my view, it is clear that the employees in question were not employed upon or in connection with the Canadian National Railway. They were employees of the applicant loading freight on a railway car under arrangements whereby the car was to be loaded by the shipper and not by railway employees.

The Court also rejected the argument that the freight forwarding business was itself an undertaking extending beyond the limits of a province or connecting one province with another:

... In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one Province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking. If that is so, as it seems to me, the mere fact that a person makes a business of collecting freight in a Province for the purpose of shipping it in volume outside the Province by public carrier, does not make such a person the operator of an interprovincial undertaking.

32. Cannet was a subsidiary of the freight forwarding company whose activities were in question in *Re The Queen and Cottrell Forwarding Co. Ltd.*, (1981) 33 O.R. (2d) 486 (Ont. Div. Ct.). There the court considered whether a similar freight forwarding operation was a federal work or undertaking not subject, for that reason, to provincial licencing requirements. The court reviewed the applicable jurisprudence, and particularly the decision of the Federal Court of Appeal in *Cannet Freight Cartage Ltd. and Teamsters Local 419*, *supra*. At page 491 of the report of its decision, the Court said:

... While the decision of the Federal Court of Appeal is not binding upon this Court it is certainly persuasive. In any event, I agree with the decision with certain amplifications. The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it could contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. This would be unreasonable interpretation of the section in question.

(emphasis added)

33. The courts' determinations in the *Cannet* and *Cottrell* cases were anticipated by this Board in *Otter Freightways Limited*, [1975] OLRB Rep. Jan. 1. The respondent in that case

was engaged in a freight forwarding business in which one of its regular activities was to make deliveries in the Hull area from its Ottawa terminal across the Ontario-Quebec border. Although the Board found that it was without jurisdiction for that reason, it emphatically rejected the argument that the respondent's operations fell within federal jurisdiction on the theory that it was an integral part of the operation of the railway over which it shipped its customers' goods. After reviewing the authorities in detail, the Board noted, at paragraphs 12 and 13, that:

12. . . . Canadian Pacific Railway has not sought out the respondent and engaged it to perform an integral aspect of the railway's responsibilities. Rather, the respondent is primarily engaged in servicing its own customers (i.e., delivering their goods, etc.) and it has chosen to do this, in part, by rail as opposed to "over the road". Therefore while Canadian Pacific Railway obviously enjoys such patronage it is in no way an integral part of its operations. It is convenient but is in no way necessary or integral to the operation of a railway. In other words while it is convenient to the railways to have only one customer the primary purpose or benefit of freight forwarding is to serve the many customers who deal with the freight forwarders, and therefore the benefit flowing to the railways is only of tertiary nature. (This perspective is very nicely developed in relation to airline limousine services in *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al, supra*, p. 277.) Accordingly *an enterprise cannot parasitically and unilaterally make itself an integral part of a federal undertaking unless it is performing a service that is of a primary value to that undertaking and requested by the federal undertaking on that basis*. In the facts before us the respondent has merely agreed to transport *its* customers' goods to some other geographical point and has elected to do this by rail. It could have elected to do it by truck or by air but chose the rail. This election is to its own benefit and convenience and is not an integral part of Canadian Pacific Railway's activities. (Canadian Pacific Railway is only a passive medium in the relationship with the respondent.)

13. Or another way to phrase this same perspective is to examine the primary purpose and function of the respondent's business. This perspective forces one to look to the respondent's customers — not to Canadian Pacific Railway. The respondent delivers matters to and from railroad terminals for the customers — not the railroad. In other words its primary value, or nature of the respondent's business, is that of a parochial delivery agent and only incidentally does the railroad become involved. It is this perspective which distinguishes these facts from *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers and M & B Enterprises Ltd.* [1974] 1 W.W.R. 452 (S.C.C.), where a trucking firm had been engaged by the Canada Post Office to handle and collect mail. There the company was working for the Canada Post Office performing one of its functions and the company was therefore an integral part of that activity; (see also *City of Kelowna v. Labour Relations Board of British Columbia and C.U.P.E., Local No. 338*, 74 C.L.L.C. 14,207 (B.C.S.C.). Whereas had the arrangement been one of numerous customers asking the trucking firm to deliver mail to the Post Office the relationship with the Post Office would have been quite collateral or secondary.

34. In *Airgo Agency Limited*, [1982] OLRB Rep. Sept. 1233, the Board, following decisions respecting railway freight forwarders, concluded that the operations of an air freight forwarder were not excluded from provincial jurisdiction. The business in question in that case was much like that of the railway freight forwarders, in that it sold to consignors, at their behest, air cargo space for which it contracted with their carriers. In that case, the respondent employer also acted as agent of airlines in booking air cargo space on their behalf. The Board concluded that the sale of air cargo space and services did not amount to engaging in interprovincial transport or aeronautics, even when the engagement was by the federally regulated supplier of such services rather than by a local customer. The latter activities, the Board held, were analogous to the activities of Intervac in the *Wardair* case. The Board also noted that the respondent's involvement in customs matters did not alter its status.

35. We noted earlier that in *Kuehne & Nagel International Ltd.*, *supra*, the B.C. Labour Relations Board found that federal jurisdiction to regulate the customs related activities of customs brokers was an insufficient basis on which to rest a claim that the labour relations of customs brokers was a subject excluded from provincial jurisdiction. In *Pacific Customs Brokers Ltd., v. Office & Technical Employees' Union et al.*, [1980] 4 W.W.R. 587, 80 CLLC ¶14,022 (B.C.S.C.), the court rejected another customs broker's argument that either the nature or the extent of federal control over the business of a customs broker made it a "creature of Parliament" and brought its labour relations within exclusive federal jurisdiction. The employer there emphasized that the vast majority of importations into Canada were processed by brokers who, in the result, collected from their clients and remitted to federal authorities a significant portion of the tax revenue arising out of importations. It argued on these facts that a customs broker's undertaking is integral and essential to the operation of the federal customs service. The court also rejected this argument, and succinctly characterized the customs brokers' position in the following way:

Customs brokers in my view do not perform any function essential to the maintenance or continuance of the customs service. Undoubtedly they simplify the collector's task because they are experts in the same way as income tax consultants are experts but they are not essential. The customs service could deal directly with the public and vice versa, if the customs broker did not exist. Albeit the process would be more cumbersome for both sides.

36. Circumstances of the sort described in paragraph (c) of the *Wardair* judgement arose in a telecommunications context in *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, (1983) D.L.R. (3d), 47 N.R. 351 (S.C.C.). There the Canadian Union of Public Employees had applied to the Canada Labour Relations Board for certification with respect to the employees of Paul L'Anglais Inc. and J. P. L. Productions Inc. Both employers were subsidiaries of Tele-Metropole Inc., a television broadcasting business. C.U.P.E. was also seeking a declaration pursuant to section 133 of the *Canada Labour Code* that the parent company and its two subsidiaries were a single employer. Paul L'Anglais Inc. was in the business of selling sponsored television air time for its parent company and, to a much lesser extent, for other unrelated broadcasters. J.P.L. Productions Inc. was a producer of commercials and of television and other programming, both for its parent company and, to a much lesser extent, for others. Neither subsidiary broadcast programmes or commercials itself. The two subsidiaries objected that neither of them was a business within federal jurisdiction, although the business of their parent admittedly was. The C.L.R.B. ruled that the subsidiaries were within federal jurisdiction, and they then sought judicial review. The question ultimately came before the Supreme Court of Canada. Mr. Justice Chouinard quoted the passages from *Montcalm Construction Inc., v. Minimum Wage Commission*, *supra*, and *Northern Telecom No. 1*, *supra*, cited in paragraphs 29 and 16 of this decision. He then analyzed the businesses in question in the manner described by the B.C. Labour Relations Board in *Aero Transfer Co. Ltd.*, and approved by the Supreme Court in *Northern Telecom No. 1*. He concluded that the activities in question were not themselves federal in character, and that their link with the operations of Tele-Metropole, the "core" federal undertaking, was not "vital", "essential" or "integral":

... in my opinion the facts alleged do not show a "vital", "essential" or "integral" relationship between the operation of Tele-Metropole Inc. and those of its subsidiaries.

It was admitted that respondents are subsidiaries of Tele-Metropole, which is their principal, though not their sole, customer, that the Boards of directors of the three companies have certain directors in common and that various services are shared.

The sales which are made by respondents' employees and the programs they produce



serve Tele-Metropole. The activities of respondents' employees are conducted on a continuous and regular basis. These facts do not necessarily create the requisite relationship between the respective operations of the businesses. A television broadcasting undertaking may well sell no sponsored air time and produce no programs, yet remain a television broadcasting undertaking. Conversely, an undertaking may sell sponsored air time for another or produce programs which it sells to another undertaking without thereby becoming a television broadcasting undertaking.

It may be asked whether these activities would fall within the field of television broadcasting if they had been undertaken by companies completely unrelated to the parent company. I think the answer to this question is clearly so. Selling sponsored air time and producing programs and commercial messages does not make the seller or producer a television broadcaster. Furthermore, these activities are not indispensable to the Tele-Metropole Inc. operation.

The Attorney-General of Quebec wrote, correctly in my view (translation):

In the case at bar we do not contend that no relationship existed between the activities of Tele-Metropole Inc. and those of Paul L'Anglais and J.P.L. Productions Inc., or that the fact that a television broadcasting station has its air time sales company or production company does not constitute a benefit to its operations. We are simply saying that these links with a television broadcasting undertaking do not have the effect of making the undertaking which produces the programs and the undertaking which sells air time component parts of the television broadcasting in all respects. We argue that Paul L'Anglais Inc. and J.P.L. Productions Inc. are not engaged in television broadcasting, but rather in the sale in the one case, and production in the other, of television programming.

(Pages 218 to 219 D.L.R., 376-378 N.R.)

This case clearly illustrates the care with which the words "vital", "essential" or "integral" must be used when examining the relationship between a core federal work or undertaking and a business somehow associated with it, when determining whether the latter is to be regarded as part of the former in the assessment of constitutional jurisdiction over the latter's activities. A commercial television broadcast enterprise might well regard the sale of its air time and the revenue generated by it as "vital", "essential" or "integral" to its continued existence. It might say that the production of commercials and programming must take place or there would be nothing to broadcast, and is therefore equally "vital", "essential" or "integral" to the existence of the federally regulated core activity. The jurisprudence we have reviewed to this point makes it clear, however, that these words are used in a very narrow sense, with special emphasis on the word "integral", and they do not embrace economic or physical essentiality or interdependence as a sufficient condition to the extension of exclusive federal jurisdiction over the labour relations of entities on which a federal undertaking is merely economically or physically dependent.

37. The cases which received the most attention in argument were a series of decisions dealing with constitutional jurisdiction over the labour relations of employees of Northern Telecom and its predecessor companies. The first of these in time was *Regina v. Ontario Labour Relations Board ex parte Dunn*, *supra*. There an order of prohibition was sought to prevent the Ontario Labour Relations Board from dealing with an application for certification with respect to employees of Northern Electric at one of its manufacturing plants. On the rather sketchy evidence before the Court, it appeared that Northern Electric was owned almost entirely by the Bell Telephone Company Limited. The plant in question manufactured switching equipment of the sort then used in Bell's central offices and in the offices of subscribers who had private branch exchange systems. Ninety-five per cent of the plant's output was received

by Bell, and one hundred per cent of the equipment used by Bell was manufactured by Northern Electric. Chief Justice McRuer rejected the argument that Northern's supplying of equipment essential to the operation of the Bell system resulted in Northern becoming an integral part of or necessarily incidental to the operation of Bell's undertaking:

... The manufacturing of crossbars at the Bramalea plant does not necessarily become an integral part of telephone communication because they are purchased by and used by the Bell company. The process of manufacture could be carried on by any other company, or crossbars could be purchased, no doubt, in many countries of the world if Northern Electric ceased to manufacture them. The fact that a large portion of the output is bought by the Bell company surely cannot determine whether the relationship between the employers and employees of Northern Electric comes under the Dominion Act or the Provincial Act. I do not think the *Stevedoring* case goes so far as to bring Northern Electric operations at the Bramalea plant within the jurisdiction of the Parliament of Canada.

38. The next in this line of cases is *Regina v. Ontario Labour Relations Board, ex parte Northern Electric Co. Ltd.* [1970] 2 O.R. 654, 11 D.L.R. (3d) 640 (Ont. H.C.). There Northern Electric applied for judicial review of a decision of the Ontario Labour Relations Board granting certification with respect to employees of the company in its installation department. Northern Electric's principal customer was Bell Telephone, its parent company. Employees in Northern Electric's installation department were involved in the installation and testing of equipment sold by Northern to Bell. The Court noted at page 661 O.R., 647 D.L.R. that:

Testing of such equipment may be a very simple or a very complex operation depending upon the equipment or system used. Such testing may involve the internal testing of the individual unit installed or it may be on a system, from one point to another, which is known as systems line-up testing. Many of these system line-up tests cross provincial boundaries in the course of testing. This type of test is performed over radio, line or cable depending on the type of system installed. The purpose of such testing is to ensure that the system meets its performance requirements as outlined in the specification requirements.

Northern Electric argued that the OLRB was without jurisdiction over its labour relations with these employees, because they were engaged in an integral part of the operation of an inter-provincial communication network. Mr. Justice Lacourciere found that the systems line-up testing performed by Northern Electric installers involved the operation of an interprovincial communication system. He framed and answered the question before him in this way: (at page 669 O.R., 655 D.L.R.):

Apparently the principal customers of the applicant come within the legislative jurisdiction of Parliament. The difficult question, which is a factual one, is whether the work of systems installations and line-ups, and the extension and updating of the communication networks, is an integral and necessarily incidental part and parcel of the federal customers activities.

• • •

There can be no doubt that the telephone, telegraph and telecommunication companies could not function without the initial installations, and their continuous improvement, extension and expansion. With great respect and deference I cannot adopt the distinction made by the Board; it would seem to me that, if a separate stevedoring company whose employees are engaged in the loading and unloading of cargo can be said to be an undertaking forming an integral and necessarily incidental part of a shipping company, *a fortiori* a company whose installers create the operational systems of communication companies must stand in the same relationship. These communication systems could not exist without the creation and installation of these systems.

• • •

... The examiner's report makes it clear that Northern Electric Co. Ltd. enters into contracts for installation work of a large number of general trade privately owned telephone companies across Canada; and it will install not only its own equipment but telecommunication systems or equipment manufactured by other companies such as Marconi, Radio Corporation of America (RCA) and General Electric. It would appear, however, that Bell is still the major customer with its coast to coast microwave network. The relationship between the installation department of Northern Electric Co. Ltd., and the Bell Telephone Co. is such that I must conclude that, on balance, the former forms an integral and necessarily incidental part of the latter.

39. In *Re Northern Electric Co. Ltd. and United Steelworkers of America, Local 8001*, *supra*, the Quebec Court of Appeal, in a brief decision, concluded that labour relations between Northern Electric and installers it employed in Quebec to install equipment for Bell Telephone fell within federal jurisdiction. The court's decision says little about what the installers did in the course of their work, and appears to be based on the view that Northern Electric was an alter ego of Bell Telephone and that its employees should be treated, for constitutional purposes, as though they were employed by or as a department or division of the parent company. The result of this decision, as with the result of the above-noted decision of Mr. Justice Lacourciere, was that a provincial labour relations tribunal was found to be without jurisdiction to deal with an application by a trade union to represent employees of Northern Electric. In 1974, the Communications Workers of Canada sought to represent certain employees at Northern Telecom Limited, (formerly Northern Electric Company Limited). No doubt mindful of the earlier court decisions, that union made its application for certification to the Canada Labour Relations Board. Northern Telecom expressly declined to challenge the CLRB's jurisdiction while the matter was before that Board, but did so afterwards before the Federal Court of Appeal and the Supreme Court of Canada. That challenge was dealt with in *Northern Telecom No. 1*, and it was in that context that Mr. Justice Dickson set out the principles quoted earlier at paragraph 16 of this decision. He noted pointedly and repeatedly that the approach of Northern Telecom before the CLRB had resulted in a record wholly inadequate as a basis on which to so apply those principles as to find reversible error on the part of the CLRB. The court therefore rejected Northern Telecom's challenge to the CLRB's jurisdiction.

40. In 1978, the Communications Workers of Canada and the Canadian Union of Communications Workers both made application to the Canada Labour Relations Board to be certified as bargaining agent for a unit of installers of Northern Telecom. This time, Northern Telecom did challenge that Board's jurisdiction while the application was still before it, and that Board's hearings dealt extensively with the "constitutional facts" necessary to an assessment of that jurisdictional challenge. On the basis of that evidence, the Canada Board concluded that the installers were not employed upon or in connection with a federal work, undertaking or business and that, therefore, it was without jurisdiction to entertain the applications. As this conclusion was contrary to that reached by the Ontario High Court and the Quebec Court of Appeal in the cases cited earlier, the CLRB referred to the Federal Court of Appeal the question whether it had constitutional jurisdiction to entertain the applications. In *Re Communications Workers of Canada et al and Northern Telecom Canada Ltd.*, (1981), 123 D.L.R. (3d) 483, that Court concluded, on the facts found by the CLRB, that that Board did have jurisdiction over Northern Telecom's labour relations with its installers. Northern Telecom appealed.



41. When the matter reached the Supreme Court of Canada, a majority of that Court concluded, with some hesitation, that the work of the appellant's installers, and hence their labour relations, fell within federal jurisdiction. Mr. Justice Estey, with whom Justices Ritchie, McIntyre and Lamer concurred, summarized the facts which led him to that conclusion in the following manner (at p. 180 N.R.):

... The almost complete integration of the installers' daily work routines with the task of establishing and operating the telecommunications network makes the installation work an integral element in the federal works. The installation teams work the great bulk of their time on the premises of the telecommunications network. *The broadening, expansion and refurbishment of the network is a joint operation of the staffs of Bell and Telecom.* The expansion or replacement of the switching and transmission equipment, vital in itself to the continuous operation of the network, is closely integrated with the communications delivery systems of the network. All of this work consumes a very high percentage of the work done by the installers.

(emphasis added)

Mr. Justice Dickson, as he then was, concurred in the result. He described the installers' work this way:

... The installers have nothing to do with the actual manufacturing of equipment. They never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, *the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers. The Telecom installers install equipment necessary to the functioning of the general system, not the equipment required by the average user.* The installers usually install Telecom equipment, but they are capable of installing, and sometimes do install, equipment manufactured by others. The installers have no real contact with the rest of Telecom's operations.

• • •

I agree that the mere fact that installers do on-site testing does not *per se* mean the installers are operating the federal undertaking. I also agree that the fact installation is a complex procedure is not determinative. I do not, however, agree that installers' work is properly characterized as construction as in *Montcalm, supra*. The respondent Communication Workers of Canada gives the following analysis of the work of installers:

The overwhelming majority of N.T.C. installation work involves rearranging, updating or adding to the capacity of the existing, operational facilities of the telephone network. N.T.C. installers work in existing operational central offices and radio relay stations, improving the network as the needs of the customers of the telephone company evolve. As such their work is not preliminary to the set-up of the telephone network, but rather part of its ongoing expansion and modernization. In the General Switching Division, at least 80% to 90% of the work done by installers involves rearrangements or additions to existing switching equipment in operational central offices. The same figures apply in the Transmission Installation Division, where installers rearrange, improve or expand the capacity of existing radio relay stations.

This is not construction in the sense in which construction was held to be under provincial jurisdiction in *Montcalm*. In *Montcalm*, once the airport was completed, the construction workers would have nothing more to do with the federal undertaking. Bell Canada's operations are much different. The nature of Bell Canada's telecommunications system is that it continually is being renewed, updated, and expanded. Bell's system is highly automated, constantly being improved. It is the installers who perform this task. Although their job is not "maintenance" in the strict sense of the word, I think it is analytically much closer to maintenance than to ordinary construction of a federal undertaking. The installers' work is not preliminary to the operation of Bell Canada's undertaking; the work is an integral

part of Bell Canada's operations as a going concern. It was earlier noted the installers have no contact with the rest of Telecom employees. In contrast, they do have contact with, and must closely co-ordinate their work with, Bell Canada employees. In this overall context, installation is not the end of the manufacturing process. It is not even properly described as the *beginning* of the operation of the federal undertaking. It is simply an essential part of the operations process. The installers' work is not the same kind of participation in the day-to-day operations of the federal undertaking as was present in the *Stevedoring* case or the *Letter Carriers* case, *supra*, in the sense that Telecom installers ordinarily do not directly service users of the federal undertaking. That does not, however, render the installers' work any less vital to the federal undertaking.

Justices Beetz and Chouinard dissented, holding that the installation of components in a federal undertaking remained distinct from the operation of the undertaking:

Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern.

At best, "the case is nicely balanced" as Le Dain, J., put it in the Federal Court of Appeal. If it be so, then what should tip the balance is not the ongoing or regular character of the work of the installers, which cannot be assimilated to maintenance. Nor is it the fact that the work of the installers is an indispensable requisite to the operation of the federal undertaking, which does not make it part of this operation. What should tip the balance in a "nicely balanced" case is, in my view, the general rule of provincial competence.

42. CTG argued that its product becomes part of Bell's network when installed, just as did the equipment installed by the Northern Telecom installers. It submitted that jurisdiction over its labour relations with its employees must be federal, as with the labour relations of Northern Telecom and its installers, not only because its employees install components of the network, as the Northern Telecom installers did, but also because they maintain that part of the network after it is installed. The applicant noted that CTG was not engaged by Bell, its employees did not spend any of their working time on Bell premises and the equipment they install is not thereafter owned or under the direct control of Bell. It argued that these distinctions from the facts stressed by the Supreme Court of Canada in *Northern Telecom No. 2* were material. Counsel for the applicant argued that there was nothing inherently federal about telephones. He noted that the physical works of most telephone companies are wholly situate within a province, and those companies were, in practice, regulated by provincial authorities and not by federal agencies. Counsel for the respondent observed that the *de facto* exercise of jurisdiction over telephone companies was not determinative of the correct allocation of jurisdiction as a matter of constitutional law, and that the correctness of the *de facto* regulatory arrangements was a serious outstanding question, citing Hogg, *Constitutional Law* (The Carswell Company Limited, Toronto (1977)) at pp. 343 and 344.

43. The issue whether there is federal jurisdiction to regulate any aspect of the business of "provincial" telephone companies has been the subject of scholarly analysis in the articles cited by Mr. Justice Dickson in *Northern Telecom*, *supra*, at p. 14 D.L.R., pp. 125-126 N.R. (reproduced above at ¶16) and in more recent writings: Brait, *The Constitutional Jurisdiction To Regulate the Provision of Telephone Services in Canada*, 13 *Ottawa Law Review* 54 (1981); and, Buchann and Johnston, "Telecommunications Regulations and the Constitution: A Lawyer's Perspective" in *Telecommunications Regulation and the Constitution* (Montreal; The Institute for Research on Public Policy, 1982). When we heard the parties' oral argument, this question had not been the subject of direct judicial examination. It has

since been considered in *Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission and C.N.C.P. Telecommunications*, (F.C.T.D.), 29 ACWS (2d) 138, a decision of Madam Justice Reed released October 26, 1984.

44. In *Alberta Government Telephone v. Canadian Radio Television and Telecommunications Commission et al.*, ("the AGT case") C.N.C.P. Telecommunications had applied to the C.R.T.C. for an order requiring Albert Government Telephones ("AGT") to permit interchange of telecommunication traffic between its telegraph and telephone systems and those of AGT. AGT applied to the Federal Court Trial Division for a writ of prohibition to prevent CRTC from proceeding with that application. It asserted that the CRTC was without jurisdiction on two grounds: that AGT was a local work or undertaking not within the constitutional jurisdiction of Parliament and that AGT was a provincial crown agent and therefore not bound by the relevant federal legislation. AGT ultimately prevailed on the latter ground. The relevant legislation was not expressly binding on the Crown, either in right of Canada or in right of the Province of Alberta. The Court concluded that, by reason of sections 16 and 28 of the federal *Interpretation Act*, the relevant legislation could not be interpreted as binding upon the Crown in any of its emanations, including the Crown in right of the Province of Alberta, and could not, therefore, be interpreted as applying to an agency of the Crown in right of the Province of Alberta, as the Court found AGT was. It is implicit in the decision that Parliament could, if it wished, amend the relevant federal legislation so as to bind the Crown in the right of the Province of Alberta and its agencies to the relevant federal legislation. It is for that reason, no doubt, that the decision dwelt at length on the question whether the business of AGT would, by its nature, fall within federal jurisdiction.

45. Madam Justice Reed summarized the facts in *AGT* as follows:

... the telecommunications facilities of AGT are physically connected to the systems of other telecommunications carriers outside the province of Alberta: by microwave at two places on the Saskatchewan border, at two places on the British Columbia border, at one location on the United States border and at one location on the border with the Northwest Territories, and by buried cable across the borders at various points. In describing this microwave linkage as physical I am using that word in its broadest sense. I am not unmindful of Lord Porter's comments in *Attorney General for Ontario v Israel Winner*, [1954] A.C. 541 at 574, that to characterize the flow of an electric discharge across the frontier of a province as a physical connection is a fanciful suggestion. However, it is clear from the Supreme Court decision in *Capital Cities Communications Inc. v Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 159, that the technology of transmission is not the legislatively significant factor.

AGT takes signals emanating from its subscribers telephone sets and transmits them to points outside Alberta; it takes signals emanating from outside Alberta and transmits them to the intended receiver in Alberta; and in some cases it may transmit signals through Alberta (refer TCTS-Telelobe agreement, paragraph 6.)

AGT's physical telecommunications facilities not only connect at the borders, there is also a more pervasive integration. The same telephone sets, line, exchanges and microwave networks are used for the provision of local and interprovincial services as well as international ones. It is clear that many AGT employees are involved in the provision of both intraprovincial and extraprovincial services without distinction.

On the organizational level there exists an unincorporated entity, TCTS, composed of the various member telecommunications carriers, each having an equal voice. This organization, of which AGT is an integral part, both at the managerial level and seemingly at the staff level, engages in planning for the construction and operation of the overall network which is comprised of each members facilities; sets technical standards; establishes terms



and conditions under which telecommunications services will be provided by the members; performs a joint marketing function; determines rates; acts as the pivotal entity for negotiating and implementing agreements for the provision of international services; operates a system of revenue sharing through the TCTS Clearing House.

AGT's argument is summarized in the following passage:

... there is agreement that AGT's enterprise constitutes an undertaking as that term has been used in section 92(10). The dispute is whether it should be characterized as a local undertaking, or as one "connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

The evidence seems to leave little scope for anything but a conclusion that AGT engages in a significant degree of continuous and regular interprovincial activity, and therefore must be classified as the latter.

AGT's argument that this is not the case focuses on two aspects of its undertaking: (1) its physical facilities do not extend outside the boundaries of the province of Alberta (if one ignores the Lloydminster situation and the spill-over along the border which occurs in the case of the mobile service), and (2) TCTS is not a legal entity — the organizational structure of TCTS is such that each member retains ultimate control over its own telecommunications system, thus the proper characterization of the enterprise is an aggregation of local systems, not an integrated national system.

Madam Justice Reed rejected the first argument because, as the Privy Council noted in *Re: Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, "Undertaking" is not a physical thing, but an arrangement under which of course physical things are used" and so the "undertaking" may extend beyond the physical works used in it. She also noted that, as the Supreme Court of Canada has said in *The Public Service Board et al v Dionne et al*, [1978] 2 S.C.R. 191 (at 197), "... the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on." Focusing on the nature of the enterprise itself, Madam Justice Reed observed that AGT offered its customers international and interprovincial telecommunication services, as well as local services, using the same physical facilities without discrimination. In determining what the undertaking of AGT was, it was impossible to ignore AGT's role as one of the ten telecommunications carriers comprising the Trans Canada Telephone System, now Telecom Canada. That involvement was pivotal in the determination at which Madam Justice Reed arrived:

This then brings us to AGT's second argument. It argues that the second requisite element for the finding of an interprovincial undertaking (what I will call sufficient organization interconnection) is not present. To paraphrase the argument: TCTS is not a legal entity and thus cannot be said to provide services to anyone; the contracting parties provide services to their own customers in their own systems and interchange traffic with other carriers; that is so even though, for commercial or public relations reasons, AGT has chosen to represent itself (in conjunction with other telecommunications undertakings) as jointly operating a national telecommunications network; and while the parties have agreed to unanimously agree, they retain ultimate control over their own telecommunications systems.

I do not find this argument convincing. It seems to me it gives too much importance to the niceties of legal structure rather than focussing on the realities of the situation. Implicit in the argument is an admission that if TCTS were an incorporated organization it would clearly be an interprovincial undertaking. This is too fine a legal distinction on which to base what is really a factual determination. I note that in *Northern Telecom Ltd. v. Communications Workers of Canada et al*, [1980] 1 S.C.R. 115, 132-3 the Supreme Court quoted from the British Columbia Labour Relations Board decision in *Arrow Transfer Co. Ltd.* [1974] 1 Can. L.R.B.R. 29:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

The issue in those cases was, of course, whether the respective enterprises were extraprovincial so as to fall within federal labour relations jurisdiction.

In my view, *the existence of TCTS, and AGT's participation in it, demonstrates the common and joint telecommunications enterprise which exists*. It demonstrates that AGT operates its telecommunications undertaking as an interprovincial undertaking and not as one merely local in nature. Also, as a legal proposition AGT may retain control over its own facilities; but as a practical reality it could not separate itself from the joint TCTS enterprise without destroying its telecommunications system in its present form. The fact that unanimous agreement is required by TCTS members should not disguise the constraints, the existence of the integrated system and the interdependence of the members will impose.

Repeated reference was made to the fact that the federal Parliament and government have never attempted, during the 80 years or so during which telephone systems have grown up, to regulate AGT. Bell Canada, which operates in Ontario and Quebec and which has been declared pursuant to section 92(10)(c) to be a work for the general advantage of Canada, has been federally regulated; so has the British Columbia Telephone Company (also the subject of a section 92(10)(c) declaration) and CN with respect to its "Northwest Telephone system". Telesat Canada is, of course, federally regulated. The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights. (Refer: *Attorney General of Manitoba v Forest*, [1979] 2 S.C.R. 1032 for a case in which unconstitutional action had remained unchallenged for ninety years.)

I conclude, therefore, that AGT is a non-local undertaking as described in section 92(10)(a) of the *Constitution Act, 1867*.

(emphasis added)

46. As the question of federal jurisdiction to regulate "provincial" telephone companies had been addressed in the argument before us, we directed the Registrar to write to counsel and invite them to provide written submissions concerning the relevance of the *AGT* decision to the circumstances of the case before us. Both counsel responded to the invitation. The respondent argued that the *AGT* decision supported its position, both as to the result and the reasoning which should lead to the result, and that the undertaking of the respondent was entirely analogous to the undertaking of Alberta Government Telephones. The reach of the latter submission can be seen in this extract from the respondent's written argument:

While it is true that the physical facilities which are installed, maintained and repaired by the Respondent are located at the customers' operations, as the *AGT* case demonstrates, what is important is that it is an undertaking which connects the province with any other or others. That is to say that Respondent, like the AGT, offers to its customers local, interprovincial and international telecommunications services. Moreover, the system which is installed, maintained and upgraded by the respondent controls the way in which the respondent's customers utilize the Bell Network and the facilities of other TCTS members.

Counsel for the applicant argued that the importance of the *AGT* decision lies in the emphasis it places on the nature of the enterprise in question; he submitted that CTG's enterprise is much different from that of Alberta Government Telephones.

47. Before considering the specific applicability of the *AGT* decision, we will examine first the general argument that CTG's labour relations must be within federal jurisdiction because CTG's operations form an integral part of the operation of Bell Canada's telephone network. Analysis of this argument should proceed on the course identified by the B.C. Labour Relations Board in *Arrow Transfer Co. Ltd.*, and approved by the Supreme Court of Canada in *Northern Telecom No. 1*. As in the *Northern Telecom* cases, any core federal undertaking must be found within "the telephone and telecommunications system". There are various descriptions of telephone systems in the court decisions and articles referred to earlier in this decision. Hardly any of the testimony in this case focused on the nature of Bell Canada's works and undertaking, however. Armed only with that testimony, we would understand no more about the telephone network than the average Bell subscriber does, and that may be succinctly stated this way: if I tell the telephone system who I want to speak to, it will (usually) connect me with that person and carry our signals back and forth between us until one of us tells the system to stop. The average user does not know, and we do not know from the testimony before us, how the network actually makes, maintains and breaks connections between one user and another. What average users see, and what the testimony before us focused on, are the terminal devices used to signal user requirements to the network, convert user signals to the form required by the network and convert signals carried to him by the network back into a form intelligible to the user. It is, perhaps, some measure of the relationship between CTG and Bell that counsel considered it unnecessary for us to know anything about Bell's core federal undertaking.

48. Before the CRTC's interim decision in 1980, the telephone user's connection to the telephone company's network was, usually, mechanical and acoustic. The telephone handset represented the terminus of the network from the perspective of the user. He would signal his needs to the network mechanically, by "dialing" (which today often involves pushing buttons), or acoustically, by speaking to the operator. Once the requested connection with another user was made, the interface with the network was typically acoustic — the user sent and received audio signals through the mouth and ear pieces of the handset. The function of the handset and any associated PBX equipment was and is to convert the acoustic and mechanical signals of the user into electrical signals which travel from the user's premises over telephone lines to the local telephone exchange office, whence they are retransmitted in whatever form and by whatever means may be appropriate to the nature of the communication.

49. In its interim decision in 1980, and its final decision in 1982, the C.R.T.C. "unbundled" the provision of terminal equipment from the provision of telephone network services. The electrical signal received by the network over the local loop may now be generated either by a handset or other equipment provided by the telephone company or by functionally compatible equipment supplied by the user. CTG argues that user-supplied equipment remains part of the network for the purpose of constitutional analysis, and for that proposition depends heavily on the emphasized portions of the following passage from the decision of the Federal Court of Appeal in *Northern Telecom No. 2*, at pp. 487-488 (D.L.R.), where Chief Justice Jaccett described what he understood to be the core federal undertaking in that case:

The object of the undertaking is to transmit messages for subscribers for a fee or toll. But the undertaking is not confined to that. In order to provide the service telephones with lines to them must be installed in subscribers' premises. Bell's undertaking includes that. It is not unheard of for telephone companies to charge for that service. The work is mostly done by Bell's own technicians and no one questions that both installations and removals and repairs to keep the telephones in operation are part of the Bell undertaking. Telephone lines must also be installed to connect subscribers' premises to Bell's central exchanges where a subscriber's call is switched to the line of the subscriber



who is being called. Such work is also carried out by Bell and again no one questions that it is part of Bell's telecommunications undertaking.

The system also requires the installation of equipment for Bell's central exchanges. It requires as well, on a continuing basis, the maintenance, renewal, rearrangement, addition to and updating of such equipment as it becomes necessary to meet the expanding demands of a growing population of subscribers and to keep the system abreast of technical developments in the telecommunications field. The day to day maintenance of such central exchange equipment is, as I understand it, generally carried out by Bell technical personnel. However, in general, the installation of additional and renewal equipment as well as the rearranging and updating of existing equipment is done by Telecom Canada installers. The installation, rearrangement and improvement and the expansion of the capacity of microwave radio transmitting equipment for Bell in relay stations, to perform the function of and eliminate the need for long distance cables, is also carried out by Telecom Canada installers.

Bell's policy with respect to the provision of new or additional switching and transmission equipment is to have it installed and ready for operation, as nearly as possible, just in time to meet the forecast requirement for it.

*So much for what is referred to as the core federal undertaking. In my view, it includes not only the transmission of messages for customers but as well the installation of telephones, transmission equipment and exchanges necessary to provide the service.*

(emphasis added)

The issue now before us could not have arisen in 1979, when the facts in *Northern Telecom No. 2* were heard by the CLRB, because then only network carriers normally supplied their customers' telephones and PBX equipment. The C.R.T.C.'s interim decision came some months after the CLRB decision. Nothing in the Federal Court of Appeal judgment suggests that it considered the C.R.T.C.'s decision and its implications when describing Bell Canada's activities in the paragraph in question. It was not necessary in that case to determine whether the telephone network could be considered to extend beyond the physical facilities and equipment provided and controlled by Bell Canada to equipment or persons which a telephone user may attach to Bell's lines or equipment, since the installers worked on Bell equipment on Bell's premises at the behest of Bell.

50. We do not regard the decisions in *Northern Telecom No. 2* as determining that customer provided terminal equipment itself must be considered an integral part of the Bell telephone network for the purpose of determining whether federal regulatory authority extends to the labour relations of persons engaged in the installation and maintenance of customer provided terminal equipment. Bell still rents telephone terminal equipment to those who rent its telephone network services. We have no difficulty with the proposition that Bell's labour relations with those of its employees engaged in the installation and maintenance of the terminal equipment it rents still fall within federal jurisdiction, because of the nature of the balance of Bell's undertaking. The cases reviewed earlier illustrate that that fact is not determinative of the question whether the performance of these tasks by others not engaged by Bell would bring their labour relations similarly within federal jurisdiction. In our view, the core federal undertaking here is the transmission of messages from one user to another, just as the core federal undertaking of a railway is the carriage of people and freight by rail from one point to another. Telephone terminal devices convert the user's audio signals into electrical ones, so that — to extend the analogy — they can be "loaded" onto the network. In this regard, the relation of the terminal equipment to the network may be analogized with the relation to a railway of those who load freight into box cars. The *Cannett* and *Cottrell* cases make it clear

that such workers fall within federal jurisdiction for labour relations purposes only if they are part of the railway's work force and not if they are employed by the railway's customers or by a broker interposed between the railway and its customer. We have focused on the equipment in this part of our analysis because that was the focus of a good deal of the argument. Of course, that approach does not focus directly as it should, on the nature of the putative "secondary operation" itself and *its* relationship to the core federal undertaking.

51. Bell's telephone network is unquestionably an interprovincial undertaking, subject in all aspects to federal regulation. Of course, not every entity which comes into contact in some way with a federal undertaking will become subject to exclusive federal jurisdiction over every aspect of its business. Telephones are ubiquitous. It is difficult to think of an enterprise which does not make use, as a customer, of the services of Bell Canada or another telephone company offering similar services. It might be said that telephone company customers "operate" the telephone network when they use it. Use of the telephone does not result in the customer becoming subject to exclusive federal regulation of those aspects of its enterprise which would otherwise fall within provincial jurisdiction. It makes no difference whether the calls placed by the user are local or long distance ones. When a telephone user speaks to another user in another province or country, he and the other user do not thereby become federal works or undertakings or necessarily integral parts thereof. The interprovincial or international undertaking continues to be that of the telecommunications carrier or carriers involved in providing the communications link, and not that of the users themselves. As a practical matter, interprovincial and international telephone networks would not function without customers making them function. Indeed, as they have a commercial aspect to them, the networks might cease to exist in a real sense if there were no customers for these services. Telephone users and customers may be commercially "essential" to the existence of interprovincial and international telephone networks, but that does not result in telephone users being treated as part of the telephone network in assessing the constitutional division of legislative authority over the labour relations of those customers. The decision in *Paul L'Anglais Inc.* is clearly inconsistent with the proposition that economic essentiality to the core federal undertaking is sufficient justification for federal jurisdiction over a secondary enterprise. Of course, telephone company customers may be subject to federal regulation for reasons quite interdependent of their use of the telephone. The mere fact that a customer carries on business in more than one province, however, would not alone cause that result, nor would the result be different if employees of the enterprise at one of its locations regularly spoke to fellow employees in another province by telephone. The fact that the telephone company's customer is "connected" to the Bell network and "operates" it on a regular basis does not make the customer part of the network for constitutional law purposes.

52. It is important to an assessment of CTG's undertaking in relation to Bell's to recognize that CTG acts throughout at the behest of a Bell customer, not at the behest of Bell. It deals with Bell as agent for their shared customer, not as principal. As agent for the Bell customer, CTG seeks and obtains from Bell only what the customer could seek and obtain, and it does and is permitted to do no more than the customer is permitted to do itself. The CRTC has said that a Bell customer may attach equipment to Bell's network if it enters into a particular contract with Bell. As with any other commercial contract, performance of the one between the customer and Bell requires some coordination between the two of them. CTG takes over that coordination function from the customer, but that does not change the nature of that function. It is the coordination involved in carrying out a commercial arrangement. It does not have the result that the "broadening, expansion and refurbishment of the network" becomes a "joint operation" of the staffs of Bell and CTG, any more than those activities could be

described as a joint operation of the staffs of Bell and its customers. The respondent emphasized the fact that CTG tests Bell's lines after a new installation is cut over. Indeed, there was a reference to testing new systems over Bell circuits which crossed the provincial boundary between Ontario and Quebec. Nothing in the evidence suggests that the latter activity had been anything more than "casual" in the sense intended by Mr. Justice Beetz in the latter part of the first of the passages from *Montcalm Construction Inc.*, quoted in paragraph 29. More importantly, however, it cannot be said that such testing amounts to operating the network in the sense Mr. Justice Lacourciere meant when describing the operations of Northern Electric installers in *R. v. OLRB ex parte Northern Electric Co. Ltd.*, *supra*. CTG does not test the lines *for Bell*, either as part of an engagement by Bell or to check work it has performed on behalf of Bell. The tests conducted by CTG over Bell's lines serve two other purposes. One is to test, in operation, the system CTG has installed for its customer. To the extent the test is concerned with the Bell line itself, the other purpose of the test, a test made on behalf of CTG's customer, is to ensure that the customer is getting what it has bargained for from Bell. Interprovincial or otherwise, these tests do not make CTG the operator of Bell's network so as to bring it within the scope of Mr. Justice Lacourciere's analysis, as the respondent argued they do, even assuming, in the face of Mr. Justice Dickson's analysis in *Northern Telecom No. 2*, that testing of any kind should be given the weight Mr. Justice Lacourciere gave it in his 1970 decision. There is not here the functional integration between Bell and CTG operations which existed between Bell and Northern Telecom in *Northern Telecom No. 2*. CTG does not perform work for Bell or on Bell's premises. The equipment on which it works is the equipment by means of which Bell's customers access the Bell network, not the network switching or transmission equipment employed in the core of Bell's federal undertaking.

53. In our view, CTG's activities do not make it a functionally integrated part of the Bell telephone network; it is in the same position as the various brokers, intermediaries, agents and independent producers with which the courts were concerned in *Paul L'Anglais Inc.*, *Cottrell*, *Cannett*, *Wardair* and the other cases reviewed earlier. CTG and the services it performs simply do not have the same relationship to the core federal undertaking here as the services of the stevedores did to the core undertaking in the *Stevedoring* case, *supra*. There Eastern Canada Stevedoring Co. Ltd. entered into contracts with ship operators to supply stevedores to load and unload their ships at the port of Toronto (among others). The Court found that such work was historically the work of a ship's crew. Even when performed by a land based crew of stevedores, by merchantile custom the work was regarded as the responsibility of the shipowner or charterer, rather than of the cargo owner, and was carried on under the direction of the ship's Master. In fact, the stevedores in question performed their work under the direct supervision of ships' officers using ship equipment, and their work was paid for by shipowners or charterers. A majority of the Court concluded that these activities were an essential part of "navigation and shipping", a class of subjects over which jurisdiction was and is expressly conferred on Parliament by s.91(10) of the *Constitution Act, 1867* (formerly the BNA Act). The Court held that the enterprise of supplying stevedores in these circumstances fell within federal jurisdiction. On the facts of the case the loading and unloading could easily be described as a joint operation of the ship and stevedoring crews and their respective employers. It is not difficult to see why that case is put in the category described in the passage from (a) of the Federal Court of Appeal analysis in *Wardair* reproduced in paragraph 30. We feel that the installation and maintenance of telephone terminal equipment falls within the class of activities described in paragraph (c) of that analysis. CTG's operations are not "vital", "essential" or "integral" to those of Bell Canada's core federal undertaking. Whether or not there are aspects of CTG's enterprise which may be the subject of federal regulation, federal jurisdiction over CTG's labour relations is not an integral part of primary federal competence



over some other federal subject. In our view, CTG's participation in the interconnect business does not immunize it from the application of provincial labour relations legislation.

54. The reasoning and result in the *AGT* case do not alter our conclusion that CTG's labour relations fall within provincial jurisdiction. We reject the argument that CTG's operations must be considered a federal undertaking because they are indistinguishable from those of AGT. The distinctions between the two operations are numerous, and significant. One significant distinction is that CTG does not sell message transmission services, it only supplies the means of enjoying the services made available by others. Despite the claim of counsel for the respondent in his written argument, CTG does not "operate" a telephone network or offer local or long distance telephone services of any kind. Moreover, CTG does not resell services contracted for by it with telecommunications carriers, nor does it act as agent for any such carriers. Its customers obtain telephone message transmission services directly from the telephone company and are billed by the telephone company directly for those services. AGT offered to transmit long distance messages, participated in the transmission of such messages and contracted, for its own account, with the other carriers whose facilities were needed to complete such calls. In *AGT*, the core federal undertaking was that of TCTS. AGT was an integral part of TCTS, and AGT's switching and transmission facilities were an integral part of the undertaking of TCTS. The Court found the functional identity of AGT submerged in a larger venture of TCTS, in which AGT was an active joint venturer. CTG's relationship with Bell cannot be described as a joint venture in any sense. In short, the undertaking of CTG is not the subject of exclusive federal legislative jurisdiction on any ground. We conclude that this Board does have jurisdiction to deal with the labour relations between CTG and any of the employees affected by this application.

## COMPOSITION OF THE APPROPRIATE BARGAINING UNIT

55. As we have determined that we do have jurisdiction to entertain this application, and as the panel before whom this application was first returnable determined that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, the next question with which we must deal is the composition of the appropriate bargaining unit. That issue arises out of the provisions of subsection 6(1) of the Act, which reads as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

The countervailing factors which must be balanced in making the required determination were described in *Canadian General Electric Company Limited*, [1979] OLRB Rep. Mar. 169 at paragraphs 6, 8 and 9:

6. The Board's primary concern in evaluating the appropriateness of a suggested bargaining unit is that the unit represent a viable collective bargaining entity. In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether the proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only

may it place significant strains on an employer who would be required to bargain with each group, but also it may hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the Act. As with all freedoms, the principle of freedom of association is not unbridled and must be blended with the Board's responsibility to establish an effective collective bargaining structure. The Board seeks to balance its respect for an employee's right to associate freely on the one hand with its responsibility to establish durable collective bargaining entity on the other by requiring that a proposed bargaining unit be the unit appropriate for collective bargaining but not going so far as to insist that it be the most appropriate unit (see *Parnell Foods Limited*, [1969] OLRB Rep. April 38; *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Wellesley Hospital*, [1974] OLRB Rep. Jan. 55 and *Livingston Transportation Limited*, [1975] OLRB Rep. July 568).

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8. As a general principle bargaining units limited to a particular department or a particular classification are not considered appropriate by the Board (see *The Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813). There are innumerable cases where because of its aversion of fragmentation the Board has refused to recognize as appropriate a unit containing only a small segment of employees within an employer's overall operation. In the *Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. June 340, for example, the Board stated that it would not fragment the respondent's technical employees because "to do so would create a collective bargaining situation where the respondent would be required to deal separately with clerical employees, public health inspectors, registered nursing assistants and dental hygienists." (p. 341). In *Waterloo County Health Unit*, [1969] OLRB Rep. Jan. 1016 the Board refused to certify the applicant for a unit composed of public health inspectors when there were other persons including dental hygienists in the health unit. Similarly, in *McMaster University*, [1973] OLRB Rep. Feb. 102, the Board refused to allow the applicant to carve out from the University all non-professional library employees and indicated that the appropriate unit would be all clerical, technical and office employees of the university. As well in *The Regional Municipality of York*, [1971] OLRB Rep. June 316 the Board denied the applicant's proposed bargaining unit of employees in the survey section of the engineering department when there were six additional branches of the engineering department (see also *The Corporation of the Township of Markham*, [1969] OLRB Rep. Aug. 592 and *The Board of Education for the Borough of North York*, [1970] OLRB Rep. Dec. 915). In cases where the Board has certified a segregated group of employees, it has generally been satisfied that the segment in question constituted a recognizable, cohesive group functioning as an independent entity. (see *Ex-Cell-O Corporation of Canada, Limited*, [1974] OLRB Rep. Aug. 543; *The Governors of the University of Toronto*, [1969] OLRB Rep. Feb. 1149, and *University of Western Ontario*, [1972] OLRB Rep. Dec. 1038).

9. The exercise of highly specialized skills by employees in a proposed bargaining unit, moreover, does not by itself establish that those employees form an appropriate bargaining unit. In *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, for example, the Board refused to recognize as appropriate a unit encompassing paramedicals employed in a professional capacity and declared instead that the unit appropriate for collective bargaining was one that would include paramedicals employed in both a technical and professional capacity thereby bringing together in one unit occupations such as psychologists, social workers, pharmacists, physiotherapists, radiological technicians and respiratory technologists. The Board was of the view that these two groups did not function independently of one another in that all the occupations in question were integrally related to the medical treatment process. The Board concluded that the group shared a functional interdependence because the paramedicals employed in a professional capacity regularly relied on information and analysis provided by the other paramedical occupations. To break the group along a technical/professional line would have, in the Board's view, caused undue fragmentation in the hospital.

(See also *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330 and decisions cited therein.)

56. The determination of the appropriate bargaining unit in a certification application depends on the application of the Board's general principles to the facts of the particular case. Often the application is guided by the Board's experience with certification applications and their results in like or analogous enterprises or institutions. This is the first application in which this Board has had to consider the labour relations of an employer in the "interconnect" business. The relevant characteristics of that business are quite different from those of a typical manufacturing operation, health care institution, construction company, educational institution or municipal corporation, to mention some examples of enterprises in respect of which the Board has had many opportunities to struggle with the definition of units of employees appropriate for collective bargaining. This is a case of first impression, one to which the experience acquired in applying general principles in other cases can only be applied with care and caution.

57. While a case of first impression, this is not one in which the bargaining unit issue is entirely at large. Both of the parties addressed the question when this application was first filed. In its application, the applicant sought a unit defined as:

all employees of the respondent located in Metropolitan Toronto, save and except office employees, sales staff and others excluded by the Ontario Labour Relations Act.

The applicant estimated there would be approximately 35 employees in the unit so described. In its Reply, the respondent stated that the number of employees in the unit described by the applicant would be 60, and proposed that the bargaining unit be described as:

all employees of the Respondent working in and out of Metropolitan Toronto save and except Supervisors, Managers, persons above the rank of Supervisor or Manager, sales staff, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

Note: The term "Supervisor" as used herein does not include Project Supervisors. Project Supervisors are included in the bargaining unit.

As we noted at the beginning of this decision, the parties were able to agree on the following description of the appropriate bargaining unit, although they could not agree on its composition:

All employees of the respondent in Metropolitan Toronto, save and except supervisors, managers, persons above the rank of supervisor or manager, sales staff, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

#### Clarity Note:

The term 'supervisor' as used herein does not include project supervisors. Project supervisors are included in the bargaining unit.



A description of this sort is often found appropriate, and most easily applied, in the typical manufacturing operation in which “blue-collar” workers toil in a plant physically and organizationally separate and apart from the body of “white-collar” workers who sell the products and perform the clerical and administrative functions associated with both plant and sales operations but who take no active part in the creation of the product sold. The parties’ agreement in this case can be taken as a recognition that workers involved primarily in production of the employer’s “product” may have a community of interest sufficiently distinct from those engaged in sales and administration that the production workers themselves can form an appropriate bargaining unit. The parties’ disagreements, which we will outline later, reflect the difficulty of maintaining a distinction between “production” functions on the one hand, and “office” functions on the other, when the organization and nature of the enterprise depart from the mid-century industrial model. Indeed, it is worth observing at this point that this distinction is not one which is always found desirable, even if possible, when defining bargaining units. As the Board noted in *K-Mart Limited*, [1981] OLRB Rep. Oct. 1410 at paragraph 24:

... In applications for certification which are made with respect to manufacturing operations, there is usually a clear line of demarcation between the functions and community of interest of production and maintenance workers on the one hand and office workers on the other hand. In such manufacturing operations, production and maintenance employees are included in one appropriate bargaining unit and office or office and sales employees are included in another appropriate bargaining unit. In sales and service operations these lines of demarcation are less clear than they are in manufacturing operations. For example, in *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, the Board included office, clerical and sales employees in one bargaining unit in a retail furniture outlet; and in *Jewish Vocational Service of Metropolitan Toronto*, [1977] OLRB Rep. Nov. 754, the Board included office and clerical workers, technical workers and professional workers in one bargaining unit in an organization engaged in social services.

Even in the face of a startling disagreement over the number of employees it encompassed, the parties were able to adopt a description which distinguishes between production workers on the one hand and office and sales workers on the other. The parties’ major disagreements were over the application of this distinction to particular job categories. We have adopted this distinction in resolving the differences between the parties over the composition of the appropriate bargaining unit. Much of the factual context in which those differences must be resolved has already been set out in our earlier description of the respondent’s operations. Some elaboration of that description will, however, be necessary.

58. On the date of this application, the respondent operated at two locations in the City of Toronto: 49 Bathurst Street and 146 Front Street. CTG’s operations department had employees at both locations, and they were organized into smaller sub-departments which we will call “sections”. The senior managerial person at 49 Bathurst Street was Rick Wood, the Toronto area operations manager. Three other admittedly managerial employees worked at that location and reported to Mr. Wood: Janet Gordon, assistant operations manager and supervisor of the installation section; Terry McAloon, supervisor of the “moves, adds and changes” section; and, Wentworth Small, supervisor of the repair and service section. Under his direct supervision, Mr. Small had a dispatcher, a clerk-typist/dispatcher and more than a dozen “technicians”. Both the applicant and respondent agree that all these employees fall within the agreed bargaining unit description. A further group of technicians, and another dispatcher, reported directly to Mr. McAloon in the moves, adds and changes section. Again, the applicant and respondent agree that those technicians and dispatcher fall within the bargaining unit description to which they have agreed. A further group of technicians, 8 “project supervisors” and 6 “designers” reported to the assistant operations manager, Janet Gordon.

The applicant and respondent agree that the project supervisors and technicians fall within the agreed bargaining unit description. The respondent takes the position that the designers do also; the applicant trade union says they do not, arguing that their community of interest lies more with the "office staff" whom the parties have agreed to exclude. The parties also agree that an employee described as "equipment co-ordinator", and a further employee classified by the respondent as "receptionist/clerk typist", both of whom also work at 49 Bathurst Street, would be included in the bargaining unit. There are two further employees located at 49 Bathurst Street; their inclusion is a matter of dispute. One is the operations co-ordinator, Carolyn Dunn, who reported to Mr. Wood. The other is Rainy O'Halloran, the service contract administrator, whom the respondent's organizational chart showed as reporting directly to the Director of Operations, Mr. Murphy, at 146 Front Street. The applicant argues that these two employees do not share a community of interest with the employees admittedly in the bargaining unit.

59. The customer service representatives, Telco coordinators and technical support representatives referred to earlier in this decision all work at or out of the respondent's offices at 146 Front Street. The first line manager (from the perspective of section 1(3)(b) of the Act) for the customer service representatives and Telco coordinators is the manager of the customer services section. The technical support representatives are under the managerial supervision of the manager of the technical support section. Both managers reported to Mr. Murphy at the time of the application. With the exception of the managers mentioned, the respondent says that each of these groups of employees would be included in the bargaining unit, and the applicant disputes that claim. The respondent claims that one other employee at 146 Front Street would fall within the bargaining unit: Sandra Walter, who is classified as "special assignment", a category not mentioned in our earlier description of the respondent's operations. Sandra Walter has special expertise with respect to equipment described in the evidence as the I.T.T. 3100. Mr. Murphy described Ms. Walter as "a TSR, CSR, designer, project supervisor and a technician" in relation to the I.T.T. 3100, in the sense that she performs the functions of all of those job classifications on projects which involve that item of equipment.

60. The employees admittedly in the unit and the employees disputed by the applicant are all employed in the operations department which was, at the time of the application, under the ultimate management of the Director of Operations. Employees classified as "technician" or "equipment co-ordinator" were paid on the basis of an hourly wage. The other employees, including the dispatchers, receptionist/clerk typist and project supervisors, were all paid on the basis of a monthly salary. Whether salaried or hourly rated, the terms and conditions of employment of these employees were similar in other areas, such as vacations, sick benefits, paid holidays and so on. It is apparent that CTG has employees outside the operations department who could be described as "office" staff. There is very little evidence about what they do. One would expect in any organization to find employees engaged, for example, in accounts receivable, accounts payable, payroll and other accounting functions. None of the job functions in dispute involves those activities. However limited the evidence of interchange between the disputed job functions and job functions admittedly within the bargaining unit, there is no evidence of interchange of employees between disputed job functions and "office" functions.



61. The applicant's primary argument was that technicians had a distinct community of interest because of their orientation to the hardware aspects of CTG's business. The applicant argued that these employees, together with employees who work closely with them, such as dispatchers and project supervisors, would form an appropriate bargaining unit. The applicant sought to draw the line between project supervisors on the one hand and designers and customer service representatives on the other on the basis that project supervisors had a greater "hardware" orientation than employees in the other two classifications. We are not prepared to adopt that approach. We can see no good reason why members of CTG's installation teams should be divided into separate bargaining units on the basis of whether the individual employee's focus is more on "hardware" than "software" or *vice versa*. The evidence suggests that the distinction would not be easy to draw, because hardware and software are functionally integrated in CTG's product, just as hardware oriented employees and software oriented employees are functionally integrated in the production and delivery of that product. Designers, for example, work out of the same premises and share the same immediate supervisor as the project supervisors and technicians. In our view, it would be inappropriate and excessively fragmentary to draw unit boundaries which separate the designers from the project supervisors and technicians with whom they work.

62. The applicant's "fall back" or alternate position on the appropriate bargaining unit dealt with the possibility that designers would be included in a unit with project supervisors, technicians and dispatchers. The applicant recognized and conceded that the job functions and interest of designers and CSRs were so similar that CSRs would also fall within the unit if designers did. The applicant argued, however, that the operations co-ordinator and service contract administrator at 49 Bathurst Street and the special assignment person, Telco co-ordinators and technical support representatives at 146 Front Street would all be excluded from a unit which would otherwise include the customer service representatives at 146 Front Street and all of the other employees at 49 Bathurst Street. The applicant did not suggest that the bargaining unit boundary should be struck so as to include only employees at one location or another. Telco co-ordinators share common supervision with CSRs. Their job functions are similar in some ways to those of CSRs and designers. There is a direct link between the work they do and the work of the repair and "moves, adds and changes" technicians. Again, we can see little reason to exclude them from a bargaining unit which includes the others with which we have dealt to this point, and to fail to include them would risk undue fragmentation of bargaining. Having brought the analysis to that point, then, we are unable to see why the operations co-ordinator, service contractor or special assignment person should fall outside of the bargaining unit when their jobs merely involve a different mix of functions similar to those performed by the others in the unit. When one approaches the matter from the perspective that CTG's "product" is a bundle of goods and services, and that the services are of a continuing nature, it is not difficult to say that all of these job functions relate more to "production" than they do either to "sales" or to the traditional sort of administrative or office functions performed by the excluded "sales staff" and "office staff".

63. That leaves for consideration the technical support representatives. The applicant argued that these employees should be excluded from the unit because their interest lay more with the sales personnel with whom they work. Counsel for the applicant emphasized the fact that until shortly before the application date these employees had in fact been part of the sales department and not the operations department. Even within the operations department, they share supervision with the others only at the level of the Director of Operations; organizational-



ly, although they are physically located at 146 Front Street, they are grouped with the engineering department otherwise located in Mississauga.

64. The position of the technical support representatives is certainly close to the line. However, there is no suggestion that they were moved from the sales department to the operations department in anticipation of union organizing or for some reason unrelated to their function within the organization. To the extent that "orientation" plays any part in resolving a bargaining unit issue, the undisputed evidence is that technical support representatives would, or at least should, have an operations department orientation rather than a sales department orientation. From the point of view of function, they can as easily be grouped with operations as they can with sales. Their training is closer to that of operations personnel. They would not constitute a viable bargaining unit on their own, so the question becomes whether it makes more sense to group them with the operations department than it would to group them with the sales department. We think the balance tilts sufficiently in favour of the latter that it would be inappropriate to exclude them from the bargaining unit by treating them as "sales staff" or "office staff" in the application of the agreed bargaining unit definition.

65. In summary, then, we accept the agreed description, and find that a bargaining unit so described would include not only the employees on which the parties agree, but also the customer service representatives, technical support representatives, design representatives and Telco co-ordinators specifically named in paragraph 1 of the report of the Board Officers, as well as the operations co-ordinator, service contract administrator and special assignment person referred to by name in paragraph 2 of the Officers' report.

66. The parties were also in dispute as to whether a technician named Norm Nicholson would fall within the bargaining unit for the purpose of the count. In the period prior to the application date, Mr. Nicholson spent most of his time outside of the Municipality of Metropolitan Toronto. He worked out of premises in Whitby. His job instructions came from the dispatcher and supervisor at 49 Bathurst Street, where he attended once or twice a week. Because technicians work on customers' premises for nearly all of their working time, there is bound to be some ambiguity about the geographic location of their employment. On the evidence contained in the Officers' report, however, the primary focus of Mr. Nicholson's employment was outside the Metropolitan Toronto area during a representative period prior to the application date, and we hold that he could not be described as an employee of the respondent "in Metropolitan Toronto" on the application date.

67. Having regard to the lists originally filed by the employer, the subsequent agreements of the parties and the findings set out in this decision, we find that there were 61 employees in the aforesaid bargaining unit on the date this application was filed. The applicant has filed evidence of membership with respect to 29 of those employees. On the basis of that evidence, the Board is satisfied that more than forty-five per cent, and not more than fifty-five per cent, of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on March 3, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

68. Having regard to the provisions of section 7(2) of the *Labour Relations Act*, the Board hereby directs that a representation vote be taken of the employees of the respondent in the

bargaining unit described in paragraph 4 of the Board's initial decision. All employees of the respondent in that unit on the date of this decision who have not voluntarily terminated their employment or who have not been discharged for cause between that date and the date the vote is taken will be eligible to vote.

69. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

70. The respondent devoted some argument to the proposition that the delays experienced in processing this application taken together with the provisions of subsection 2(d) of the Charter of Rights should lead the Board to direct that a representation vote be taken even if we found that more than fifty-five per cent of the respondent's employees were members of the applicant at the relevant time. The facts as we have found them did not give rise to a discretion to certify the applicant without a vote, and it is therefore unnecessary for us to deal with that aspect of the respondent's submissions.

71. This matter is referred to the Registrar.

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**2623-84-U Fatehally Khamisa, Complainant, v. Captall Investments Limited, Respondent**

**Practice and Procedure — Remedies — Settlement — Unfair Labour Practice — Employer settling complaint — Settlement requiring money payment by specified date — Payment received by complainant a week late — Complainant refusing employer offer to pay interest for delay — Seeking declaration of breach of settlement as matter of principle — Complaint dismissed**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members S. O'Flynn and W. H. Wightman.

**APPEARANCES:** *Fatehally Khamisa on his own behalf; Stephen Bale for the respondent.*

**DECISION OF THE BOARD;** February 25, 1985

1. This is a complaint under section 89(7) of the *Labour Relations Act* alleging a breach of a settlement.

2. On December 6, 1984, the complainant and the respondent entered into a written settlement of a complaint (Board File 0134-84-U) which included *inter alia*, a requirement that the respondent would pay to the complainant the sum of seventeen hundred and fifty dollars (\$1,750.00) by December 20, 1984. For personal and family reasons the complainant was anxious that the funds be paid by that date. In fact, a certified cheque was not available to the complainant until December 28, 1984. There is no dispute that the cheque was cashed and that the complainant therefore received the full amount contemplated by the settlement — albeit about a week late.

3. Counsel for the employer explained that the cheque required a countersignature of a company officer in Vancouver. Its return, by courier, was delayed somewhat by the Christmas mail and because he was out of the office for a few days. However, from conversations with the complainant's solicitor, his understanding (and he might have been wrong) was that so long as the cheque was available by the following Thursday, December 27th, there would be no difficulties. Following the launching of this proceeding, the solicitors for the respondent offered to pay interest in respect of the delay but the complainant refused to accept it. He demanded as a matter of principle to come before the Board and obtain a Board order. The sum in question would be four or five dollars. The complainant advised the Board that, as a matter of principle, he wanted a Board decision and order even if the respondent only owed one penny.

4. Having heard the submissions, the Board made the following oral ruling:

We have considered the submissions of the complainant and are not unsympathetic to his concern about payment. Indeed, it is important that settlements be complied with in accordance with their terms. Non-compliance to any degree is an irritant and potentially corrosive to the orderly process of labour relations. On the other hand, it is also necessary to have some sense of proportion in these matters. The fact is that, although there was some delay, it was not excessive nor unexplained. However, as the complainant put it, he is not concerned with the trifling amount involved in this case; if it is only one penny owing he wants a Board order to that effect. Indeed, it appears that the complainant has already been offered and refused the most that he could possibly obtain in this proceeding before the Board.



5. While the complainant is entitled to invoke the legal processes available to him and demand a hearing "as a matter of principle", and even if the amount in issue is trivial, and he may choose to spend his own funds to do so, under section 89 of the Act the Board has discretion with respect to remedy. We are satisfied in all the circumstances of this case that no order is warranted. The complaint is therefore dismissed.

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**0951-84-R** Jocelyn Young & Lynda Gattwald, Applicants, v. United Food & Commercial Workers Local 1000A, Respondent, v. **Cara Operations Limited** (Retail Stores Division), Intervener

**Representation Vote — Termination — Union distributing letter to employees prior to termination vote — Letter attacking integrity of applicants and their counsel — Allegations false — But not affecting employees' ability to make reasoned choice as to union representation — Request for new vote denied**

**BEFORE:** Harry Freedman, Vice-Chairman and Board Members F. W. Murray and W. F. Rutherford.

***APPEARANCES:** M. G. Horan and Jocelyn Young for the applicants; Bernie Hanson and Bill Cox for the respondent; A. Talvila, C. Caverly and W. Pazkowski for the intervener.*

**DECISION OF THE BOARD;** February 11, 1985

1. The Board conducted a representation vote among the employees of the intervener in respect of the full-time and the part-time bargaining units represented by the respondent on October 31, 1984. The majority of the employees in the full-time unit voted in favour of continued representation by the respondent (16 ballots in favour and 5 against) while the majority of the employees in the part-time unit voted against continued representation by the respondent (7 ballots in favour and 9 against).

2. Counsel for the applicants filed a timely letter making submissions relating to the representation vote on November 8, 1984, pursuant to the Notice of Report of Returning Officer (Form 70) that had been posted at the intervener's premises following the vote. That letter stated:

November 8, 1984

DELIVERED

Ontario Labour Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

Attention: Donald Aynsley, Esq.

Dear Mr. Aynsley:

Re: Jocelyn Young & Lynda Gattwald; United Food & Commercial Workers Local 1000A; and Cara Operations Limited (Retail Store Division) OLRB File No. 0951-84-R

I wish to acknowledge receipt of the report of the Returning Officer dated the 31st day of October, 1984. My clients have no objection with respect to the accuracy of the report. They do, however, have a serious objection with respect to certain conduct of the respondent trade union immediately prior to the vote which was held on October 31st.

Immediately prior to the representation vote the respondent trade union mailed a letter to each employee in the bargaining unit, a copy of which letter is attached to this correspondence. That letter contains two statements which are both scandalously misleading and calculated to cause irreparable harm to the position of the applicants respecting a representation vote which would determine the time and voluntary wishes of the employees in the bargaining unit.

The statements are as follows:

1. *It has been alleged that they (Jocelyn and Lynda) are in Cara's pocket and will be given management positions if they are successful in displacing your union. (emphasis mine)*

2. *It might interest you to know that it is reported that the legal counsel, who represented the decertification on behalf of the petitioners, does legal work for Foodcorp, which is owned by Cara. (emphasis mine)*

The union has clearly attempted to mislead persons in the bargaining unit and has attempted to hide behind the suggestion that someone has "alleged" or "reported" certain falsehoods. It is submitted that the damage caused by these inflammatory and unequivocally false statements is irreparable.

The applicants therefore request that the Board direct an enquiry be held into the conduct of the respondent prior to the representation vote and in particular with respect to the circulation of the enclosed letter and thereafter the applicants would request that a new representation vote be held.

Yours very truly,

"Michael G. Horan"

3. At the hearing of this matter, all counsel agreed to many facts, and those agreed facts were supplemented by the testimony of the two applicants.

4. The respondent had mailed a letter (Exhibit #1) to all employees in the bargaining units, except for the two applicants, on or about October 26, 1984, a Friday. That letter stated:

October 26, 1984.

TO: ALL CARA BARGAINING UNIT EMPLOYEES

Greetings:

Recently, a lengthy list of Company Policies, Employment Standards and Human Rights Provisions were posted to sway your thinking, as to whether or not you should have a Union. If you believe all of these items to be true, no employee, regardless of where he worked, would need a Union.

Many of the legislated provisions were in existence when the Union became your bargaining agent and these provisions are all *minimum* requirements and are not improved on a regular ongoing basis. Don't be misled by Jocelyn and Lynda. It has been alleged that they are in Cara's pocket and will be given management positions, if they are successful in displacing your Union. It might interest you to know that it is reported that the Legal Counsel, who presented the decertification on behalf of the petitioners, does legal work for Foodcorp, which is owned by Cara.

Your vote is *secret* and *important*. Exercise your vote to protect yourself and your fellow employees. Think about it. A "yes" vote is a vote for yourself and your best interest.

Fraternally yours,

"Dan Gilbert",  
President.

5. The parties agreed that the respondent's letter was received by some of the employees on October 30th and October 31st. Two employees specifically remembered receiving the letter on October 31st, while two others were not sure whether they received it on October 30th or October 31st. The parties were also agreed that the four employees who were going to be called as witnesses by the applicants had not heard it alleged that the applicants "are in Cara's pocket and will be given management positions, if they are successful in displacing [the] Union.", nor had they heard it "reported that the Legal Counsel, who presented the decertification on behalf of the petitioners, does legal work for Foodcorp, which is owned by Cara.". The parties also stipulated that the Industrial Relations Manager at Cara, who had been with Cara and Foodcorp for four years, had made inquiries and had confirmed that during her period of employment, and according to her information about the time before her employment with Cara and Foodcorp, counsel for the applicants had not done legal work for either Cara or Foodcorp.

6. Both applicants testified. Jocelyn Young had first heard about the respondent's letter on the day of the vote, between 45 minutes and one hour before the poll opened. She was shown the letter after the vote. Ms. Young testified in her examination-in-chief that when she was told about the contents of the letter she just laughed. She also said that she had been asked by an employee whom she couldn't remember and by another employee, Valerie Hoff, about being made a manager and about moving "down east" to be with her mother. Ms. Young testified in cross-examination that she had heard that rumour some time before the vote, but was not sure whether she had heard it in the month before the vote or more than a month before the vote.

7. Ms. Young had also heard the allegation that her counsel was working for Cara when she attended a union meeting on October 19, 1984. She had been asked by an employee at that meeting as to who was paying her counsel and had heard Bill Cox, an official of the respondent, comment that he didn't care who was paying her counsel, he still works for Foodcorp.

8. Lynda Gattwald had also first heard about the respondent's letter on the day of the vote, but only after the poll had been closed. While Ms. Gattwald testified in her examination-in-chief that she had not heard the rumour that she and Ms. Young would be managers before the vote, she conceded in her cross-examination that she had heard from Ms. Young about the conversation with Ms. Hoff in which the subject of being made a manager and moving down east was raised long before the vote.



9. Ms. Gattwald also recalled the union meeting at which the payment of her counsel's fee was discussed. Ms. Young had been asked whether Cara was paying for the lawyer and had replied that it was not Cara, but that someone from another union was paying the legal fee.

10. The applicants had distributed a letter to employees before the vote (see Exhibit #4) in which no comment was made about the allegation of the them being appointed to managerial positions or the comment that their counsel was working for Foodcorp. The applicants took no action to correct the statements that had been made at the union meeting or earlier by Ms. Hoff because, as Ms. Young testified, it never entered her mind to do it, she didn't think it would affect the way the people who were at the union meeting would vote, and she just thought the rumour was idle gossip. Ms. Gattwald also said that when she spoke to Millie Lavery and Anna Diversa together, two employees in the bargaining unit, after the vote about the letter, one of them had told Ms. Gattwald that she didn't believe what the letter had said, but that other employees might believe it.

11. Neither the intervener nor the respondent called any evidence.

12. Counsel for the applicants argued that the union's letter was patently false and was mailed to the employees in the bargaining units so as to preclude the applicants from being able to respond to it before the vote. Counsel relied on *McMaster University*, [1979] OLRB Rep. July 685, and *Alcan Building Products Limited*, [1971] OLRB Rep. Dec. 806 for the proposition that where patently false or misleading propaganda is distributed in such a way so as to prevent a reply being made, the Board will order a new vote. Counsel submits in this case that the allegations made about the applicants impaired the employees' ability to properly weigh the decision about union representation because the employees would perceive the applicants to be acting out of self-interest rather than in the interests of the employees in the bargaining units. Counsel also asked the Board to draw an inference adverse to the respondent because the respondent chose to call no evidence.

13. Counsel for the intervener, while taking no position as to whether a new representation vote should be ordered, drew the Board's attention to the fact that her client had not ever employed the applicants' counsel, and that another entity, not it, was paying his fees. There was no evidence that the intervener had ever done anything to cause either of the applicants to expect a management position if the application was successful. Counsel did express great concern about the spreading of false statements through the workplace, particularly where there was no evidence put forward to show any reasonable basis for the making of those statements.

14. Counsel for the respondent submitted that the letter distributed by the respondent to the employees was not an improper form of campaign literature citing *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19, and therefore the fact that it was distributed so that employees would receive it close to the time the representation vote was held is irrelevant. In any event, he submitted that the applicants knew that the rumours were in existence but did nothing to dispel them, and also submitted that the applicants were precluded from objecting about the campaign literature because they did not do so promptly, either before the poll opened, or during the taking of the vote. Counsel further submitted that the applicants, by signing the certification of conduct of election document, had waived any right that they might have had to complain about the campaign literature.

15. We believe that the appropriate approach we should follow in assessing campaign propaganda was set out by the Board in *McMaster University, supra*, at page 687, paragraph 11 which stated:

11. The Board, in general, does not consider that it should monitor campaigns preceding a representation election which are designed to persuade members of the voting constituency to exercise their franchise one way or another. It is fundamental to our society that proponents of varying views will each put forward the most persuasive arguments in favor of their position and that the electorate is competent to evaluate and decide. Despite its general position, the Board does not close its eyes entirely to the conduct of the campaign if, in its judgment the campaign has been so waged by one party to preclude the other party from a meaningful opportunity of reply and thus to impair the employees' freedom of choice and thereby call into question the weight to be accorded to the results. It is not every unanswerable claim which will cause the Board to intervene. However, in those instances in which a claim is made, which is in fact false and which relates to a significant factor which would be involved in the voter's final evaluation of the issue on which he is voting, and which the other party has not had adequate opportunity to dispute, the Board will act by ordering a new representation vote. See *Joseph Gould and Sons Limited* 52 CLLC ¶17,039.

16. That test has also been restated recently by the Board in *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19 at page 21:

As those decisions indicate, the Board does not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false. The Board recognizes that in representation votes as in other electoral processes voters must be presumed capable of assessing critically the conflicting arguments often presented by the interests which compete for their votes.

In our unanimous view, the statements here attributed to the union's representatives are not of such a nature that the *critical faculties of employee voters would have been overpowered*.

(emphasis added)

17. This Board shares the concern expressed by counsel for the intervener about the spreading of false statements through the workplace. We are satisfied on the evidence and from the fact that the respondent elected not to call a witness to explain or justify the statements made in the letter or at the meeting of October 19th that the respondent had no reasonable basis for asserting that counsel for the applicant in this matter does legal work for the intervener. Such conduct cannot be condoned by this Board. However, as this Board has said in the cases referred to above and in others as well, (see *Indusmin Limited*, [1982] OLRB Rep. Nov. 1641 at page 1646 and *Alcan Building Products Limited*, [1971] OLRB Rep. 806 at page 807). it is not our function to assess whether the statements are false, misleading, unfair, defamatory or whether the propaganda campaign has been conducted fairly by both sides. Rather, we must decide whether the letter in this case has deprived the employees of the ability to exercise their "critical faculties" in assessing whether the respondent should continue to represent them in collective bargaining.

18. The allegations made in the letter from the respondent were not threats to the critical job interests of employees by a person who could reasonably be viewed as having the power to carry out those threats nor do they relate to the ability of the respondent to represent all of the employees in the bargaining unit. Rather, we see the allegations in the letter as an attack on the integrity of the applicants and their counsel. While we do not approve of such methods of campaigning, we are not satisfied that suggesting improper motives for a party's actions

does affect an employee's ability to make a reasoned choice about the issue of union representation.

19. We are fortified in this conclusion by the testimony of the applicants. Ms. Young was aware of the suggestion that she was going to be a manager long before the vote, but did nothing to respond to it. When she was first told about the letter from the union, she laughed, and when she heard Mr. Cox's comment at the union meeting about her counsel, she did not think it would affect the way that the people who went to the meeting would vote, even though Ms. Young identified one of those people at the meeting as being "iffy" or undecided as to whether to vote for or against the respondent. Ms. Gattwald's evidence also suggests to us that at the very least, the employees in the bargaining unit that she talked to would recognize the union's letter as mere propaganda and not believable.

20. Therefore, we are satisfied that the letter from the respondent, when considered objectively, did not impair the employees' ability to freely choose through a secret ballot whether they wished to continue to be represented by the respondent. Our objective assessment is reinforced by the direct evidence of the applicants' initial reaction to the statements made by employees and a union official. For these reasons, we refuse to direct a another representation vote among the employees in the full-time bargaining unit.

21. In view of our finding, it is unnecessary for the Board to deal with the respondent's arguments that the applicants were precluded from raising this complaint about the respondent's letter to the employees.

22. On the taking of the representation vote directed by the Board among the employees of the intervener in the full-time bargaining unit, not more than fifty per cent of the ballots cast were cast in opposition to the respondent.

23. The application with respect to the full-time bargaining unit is therefore dismissed.

24. On the taking of the representation vote directed by the Board among the employees of the intervener in the part-time bargaining unit, more than fifty per cent of the ballots cast were cast in opposition to the respondent.

25. The Board therefore declares that the respondent no longer represents the employees of Cara Operations Limited (Retail Stores Division) in the part-time bargaining unit for whom it has heretofore been the bargaining agent.

26. The Registrar will destroy the ballots cast in the representation votes taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

#### **DECISION OF BOARD MEMBER F. W. MURRAY;**

1. I dissent.

2. I would have ordered a new representation vote amongst the employees in the full-time bargaining unit. A case could be made for a new vote in both the full-time and part-time units. However, this question of a new vote in the part-time unit was not before the Board and I



therefore will not deal with that issue.

3. While I agree with the majority that the allegations in the letter sent by the respondent to all of the employees dated October 26, 1984 was an attack on the integrity of the applicants and their counsel, I would also find that these allegations were also an attack on the integrity of the employer. It seems to me that such allegations would be viewed with a great deal of concern by the employees and cause them to hold with a great deal of suspicion not only those initiating the application but also their employer.

4. Issued as it was so soon before the taking of the vote and too late for any denials from either the applicants or the employer, the letter would, in my opinion, affect an employee's ability to make a reasoned choice about the issue of union representation.

5. Accordingly, I would have ordered the taking of a new representation vote.

**1660-84-R** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and Local 1474 (UAW), Applicants, v. **Collingwood Fabrics Inc.**, Respondent, v. Group of Employees, Objectors

**Practice and Procedure — Termination — Timeliness — Sale of a Business — Employee petition requesting end to union's bargaining rights with respect to part of business sold — Effect of notice to bargain to successor postponing open-period by one year — Sale not appropriate circumstance to permit questioning of bargaining rights — Petition untimely if treated as termination application**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *L. A. MacLean, Carol Aitken and Mary Meaney for the applicants; R. J. McComb and A. Van Adrichem for the respondent; Margaret J. Monck for the objectors.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** February 28, 1985

1. This application was filed under section 63 of the *Labour Relations Act*, asserting that Daal Specialties (Canada) Ltd. has sold a part of its business to Collingwood Fabrics Inc..

2. The following facts are not in dispute. The applicant was party to a collective agreement with Daal Specialties (Canada) Ltd., effective from the 1st day of November, 1982, until and including the 31st day of October, 1984. In June, 1984, the respondent, Collingwood Fabrics Inc. completed a sales transaction with Daal Specialties (Canada) Ltd. by which it purchased and acquired the Narrow Fabrics Division of Daal Specialties (Canada) Ltd. at 190 MacDonald Road, in the Municipality of Collingwood. Following the completion of the transaction by which the respondent, a newly-formed Company, acquired the Narrow Fabrics Division of Daal Specialties (Canada) Ltd., the Respondent Company has continued to carry

on the business of the Narrow Fabrics Division at 190 MacDonald Road. The President of the Respondent Company, Mr. A. Van Adrichem was a former managerial employee of Daal Specialties (Canada) Ltd. and was manager of the Narrow Fabrics Division of that Company. The employees of Daal Specialties (Canada) Ltd. who were working in the Narrow Fabrics Division are now employed by Collingwood Fabrics Inc., and notice to bargain was given by the applicant to Collingwood on August 20, 1984. The applicant since that date has also applied for and been granted conciliation services, and a meeting date with the conciliation officer has been arranged.

3. These facts disclose a section 63 "sale of a business" in its simplest form, and the respondent company, once it had retained the services of qualified labour counsel, was quick to acknowledge that. Since that time, however, a group of employees employed in the transferred operation, have filed a petition with the Board, indicating that, under the new management, they no longer wish to be represented by the applicant trade union. The only issue at the hearing before the Board, therefore, was the relevance and timeliness of that statement from employees.

4. Section 63 provides:

63-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

• • •

(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of the any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

• • •

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

• • •

(10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

Employee "petitions" are normally verified by the Board by conducting a representation vote, and as can be seen, subsection (8) provides the Board with a power to order the taking of a representation vote. As pointed out, however, in the recent case of *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, the Board has never considered it appropriate to have resort to such a vote other than in circumstances where subsection (6) (or, in the public sector, subsection (11)) applies. A simple sale of a business by itself, in other words, has not been viewed by the Board as an appropriate circumstance to place in question a trade union's bargaining rights. This is particularly so in light of the express terms of section 63(10), which create an over-ride of, *inter alia*, the "termination of bargaining rights" provisions of section 57 of the Act. Section 57 enables the Board, upon receipt of a voluntary "petition" signed by at least 45 per cent of the employees in the bargaining unit, to ascertain the current wishes of employees by way of conducting a representation vote. To give effect to the present petition by ordering a similar representation vote would seem to fly in the face of section 63(10).

5. Obviously a similar problem arises if one attempts to treat the present petition as an application for termination of bargaining rights under section 57 itself. Section 57(1) and (2)(a) provide:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation. . .

The predecessor's collective agreement expired October 31, 1984, and, absent a "sale of a business", an employee application under this section would have been timely if filed, as this petition was, on October 5th, 1984. As Mr. MacLean for the applicant points out, however, the Board in such cases as *Vaunclair Meats*, [1981] OLRB Rep. Aug. 1186; *Independent Paper*



*Convertors Inc.*, [1979] OLRB Rep. March 207; *Biltmore-Stetson*, [1983] OLRB Rep. Jan. 9, has held that the effect of section 63(10), upon a “sale of a business” taking place, is to postpone, for a period of one year from the date of giving of notice to bargain to the successor, the period during which an application to test the Union’s bargaining rights may be brought. Mr. McComb, for the respondent company, concedes that Mr. MacLean’s position is sustained by the above line of cases, but submits that the Board, in the circumstances present here, ought to reconsider that position. In particular, the respondent points to an assertion made to the Board by the petitioning employees’ spokesman, Mrs. Monck, that the trade union failed to be in contact with the employees in the unit prior to opening negotiations with the successor employer. Mr. MacLean, countering for the applicant trade union, responded with the assertion that a full investigation of the facts would reveal good reason, not unconnected with activity by the “new” employer, for the trade union having conducted itself as it has. He submits, however, that such an inquiry need not be entered into, as the only issue which the Board has before it at the present stage is the timeliness of an application under section 57.

6. The Board agrees with Mr. MacLean’s latter submission. The issue which the Board must deal with is the legal one of timeliness, and it is difficult to put any other interpretation on the language of section 63(10) than that which the preceding line of cases has done. The Board in *Vaunclair Meats*, for example, wrote:

5. . . . In drafting section 55(10) [now 63(10)] the Legislature was obviously obliged to balance the interest of maintaining the stability of bargaining rights when there is a transfer of a business, on the one hand, with the freedom of employees to terminate the bargaining rights of their union, on the other hand.

6. By the plain language of the Act, and specifically by making sections 49 [now 57] and 53 [now 61] subject to the qualification of section 55(10), the Legislature has clearly opted to give precedence to preserving the stability of a union’s bargaining rights where there has been a sale of a business. As the language of the Act reveals, the Legislature has adopted the view that special protection should extend to a union over the often unsettling period during which it seeks to establish a collective bargaining relationship with a new employer. In some cases the transition to a new management may be smooth and without incident as the successor employer willingly accepts to renew the framework, if not the precise terms, of the previous collective agreement. The transition, can, however, be jarring to a union, especially, if the new employer, bent on changing the style and methods of a business, brings fundamental proposals for change to the bargaining table. Some of these proposals may be acceptable to a union and some may not.

7. Where a business has changed hands the possibility of greater stress on a union is real; it can no longer be sure that it will bargain with the same expectations along the paths that it travelled time and again with the predecessor employer. In this sense a union bargaining with a successor employer after the transfer of a business is in a situation similar to a union bargaining a first collective agreement after certification. By enacting section 55(10) of the Act the Legislature has recognized that reality and has provided the union faced with a first negotiation with a successor employer the same protection of its bargaining rights as would operate to protect the negotiations of a first collective agreement. Like a newly certified union, a union dealing with a successor employer can proceed with the assurance that its bargaining rights cannot be subject to attack for a minimum of one year. That is the unequivocal effect of section 49(1) of the Act and it is the clearly intended consequence of section 55(10) of the Act.

8. The foregoing provisions represent a policy choice by the Legislature grounded in well established collective bargaining principles. . . .

That the same result would flow when the sale occurred while the collective agreement itself was still in effect, and the employees’ “open period” had not yet been reached, appears to have

been specifically contemplated in the language of the *Vaunclair Meats* case. The Board wrote, also at paragraph 5:

“It appears that counsel for the intervener is correct in his argument that given the proper timing, notice under section 55(3) could foreclose an open period in the event of the sale of a business.”

And indeed, whatever else might be said about the result flowing from this interaction of the provisions of section 63, it would seem stranger still if a major difference in result could be achieved by the simple expedient of manipulating the “sale” date by a few days.

7. The Board, having regard to all of the foregoing considerations, must conclude that the Legislature contemplated that no termination application could be brought by employees at the present time. Hence, even though the Board is prepared to treat the present petition as a termination application, such application will not be inquired into by the Board at this time.

8. The Board notes that it is now in receipt of a formal application for termination of bargaining rights filed by counsel for Mrs. Monck, but not received by the panel until after the hearing took place. Counsel indicates that the application was filed in the event that the Board refused to consider the initial petition filed in October as such an application. The Board has, however, so considered the original petition, so that the formal application is in fact redundant. For the reasons given above, however, the Board has found such application to be “untimely” as a statement of employee wishes.

9. Having regard to the facts and acknowledgments before it, therefore, the Board finds that a “sale of a business” occurred on or about June 29, 1984, from Daal Specialties (Canada) Ltd. to Collingwood Fabrics Inc., and that the applicant was entitled, *inter alia*, to give notice to bargain, as it did, to Collingwood Fabrics Inc. on August 20, 1984.

#### **DECISION OF BOARD MEMBER, F. W. MURRAY;**

1. I dissent.

2. I would have found that the petition or termination application should be treated as timely, and would have accordingly inquired into the petition at this time.

3. I cannot believe that the Legislature in drafting the legislation intended that the door should be slammed shut on the “open period” as provided in section 57 of the *Labour Relations Act* merely because the company has changed ownership. It is clear that the position I take flies in the face of the decision in the *Vaunclair Meats* case and to a degree the position may be in conflict with the wording of section 63 subsection 10, upon which the *Vaunclair Meats* decision was based.

4. The balancing of interest of maintaining the stability of bargaining rights when there is a transfer of a business, on the one hand, with the freedom of employees’ rights to terminate the bargaining rights of their union under section 57 of the Act, or indeed to seek a new bargaining agent under section 5 of the Act, on the other hand, comes out far more in favour of maintaining the choice of a group of employees during the open period than that of maintaining the stability of bargaining rights during the “open period” as provided in either sections 5 or 57 of the Act.

5. It would seem to me that the taking of a representation vote is far less disruptive to the employees and the employer than is the turmoil that will result for a period of at least a year if the union has in fact lost the support of the employees.

6. Accordingly, I would have treated the petition as timely and inquired into its *bona fides*.

**0298-84-R; 1698-84-M** United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant, v. **Construction P.H. Grager Inc.**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener; Labourers' International Union of North America, Local 527, Applicant, v. Pierre A. Gratton Construction Inc. and/or Construction P.H. Grager Inc., Respondent, v. United Brotherhood of Carpenters and Joiners of America, Local 93, Intervener

**Certification — Reconsideration — Sale of Business — Carpenters union certified by Board — Labourers claiming bargaining rights and revocation of certificate — Board finding sale of general contracting business to new company — Experience and expertise of management personnel essence of business in bid-oriented sector of construction industry — Board revoking certificate — Treating Carpenters' application as displacement application**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *David Jewett, Wilf Chretien and Wilf Claremont for Carpenters, Local 93; Russel W. Zinn, Pierre A. Gratton and Henri Gervais for the respondents; Mark Zigler and Andre Roy for Labourers' Local 527.*

**DECISION OF THE BOARD;** February 28, 1985

1. The present matters began with an application for certification filed by the United Brotherhood of Carpenters and Joiners of America, Local 93, with respect to employees of Construction P. H. Grager Inc. That application, brought without notice to the Labourers, Local 527, resulted in a decision of the Board dated May 16th, 1984 certifying Local 93 as bargaining agent for:

- 1) all carpenters and carpenters' apprentices in the employ of (Grager) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman;
- 2) all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial



and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

When Labourers' Local 527 learned of this certification, they immediately requested reconsideration of the Board's decision on the basis that they already held bargaining rights for such employees through a prior company, Pierre A. Gratton Construction Inc., being either a "related", or "successor" employer to the present. Local 527 has subsequently filed a section 124 grievance referral with the Board as well.

2. Much of the work in which either of the two companies have employed labourers or carpenters has been formwork, and the Labourers' collective agreement with Pierre A. Gratton Construction Inc. includes in its coverage, amongst other things, the classification of "form-setter". The parties are agreed, therefore, that since the Carpenter's application was brought during the last two months of the Labourers' collective agreement, if the Labourers are correct in either their "related" or "successor" employer allegations, the Carpenter's application for certification in fact becomes a "displacement" application, which would require the holding of a representation vote.

3. A number of difficulties may stand in the way of the Labourers collecting damages in this matter. It is important, however, that the issue of bargaining rights be sorted out as quickly as possible for the benefit of all parties, and to that end the Board has heard the evidence and representation of the parties with respect to the section 63 and 1(4) issues.

4. The bulk of the evidence with respect to sections 63 and 1(4) was given before the Board in uncontradicted fashion by Messrs. Pierre Gratton and Henri Gervais. Those two individuals, together with one Charles Vandal, up until 1979 had worked together as employees for a number of years in a large company by the name of Laflamme. Mr. Gratton is an engineer by profession and advanced to the position of Vice-President and Chief Engineer for Laflamme. Mr. Gervais is a long-time operator of heavy equipment and Mr. Vandal is a supervisor highly skilled in the intricacies of concrete formwork. In 1979 all three left Laflamme to go into business for themselves, and formed a joint venture to build a large bridge in the Province of Quebec. When that project was successfully completed, the three partners agreed to each take their own share of the profits and go their own way. Mr. Gratton formed Pierre A. Gratton Construction Inc., and carried on the business of a general contractor. His expertise and interest has always been in work with a significant concrete-forming component, and his involvement in general has been with the building of bridges, including, as he says, sewer and watermain work, or what he describes as "heavy construction". There was, however, in the years preceding the formation of the second company, Construction P.H. Grager Inc., little bridge work around, and Mr. Gratton had to settle for whatever jobs he was able to successfully bid on involving sewer and watermain installations alone. The one job that he had in Ontario was as a sub-contractor to Greenbelt Construction, who was involved in building a portion of the Transit Way for the Regional Municipality of Ottawa-Carleton. That sub-contract involved the installation of an open-trench sewer culvert, and had a value of approximately one million dollars. Mr. Vandal, whose business since the joint venture was not disclosed by the evidence, helped Mr. Gratton from time to time with the formwork portion of some of his jobs in Quebec, and Mr. Gratton hired him in late 1982 on a full-time basis to act as job superintendent for the Greenbelt contract.

6. The idea to put together the new company came from Henri Gervais. Mr. Gervais was the owner of some heavy construction equipment, and by renting that out, together with

himself as operator, has succeeded in accumulating a considerable amount of cash. His efforts in the field of general contracting, however, had been considerably less productive. He had managed to pick up a few small jobs here and there, but of the many jobs of any significant size on which he had bid, he was successful in landing a contract for none. He was aware of the million-dollar Greenbelt contract which his friend Pierre Gratton had been able to obtain on his own, and Mr. Gervais decided that he ought to get himself "an agent". He accordingly went to see Mr. Gratton at his home in February of 1983, and offered to put money into a company that the two of them would go into together. Mr. Gratton's bonding company had been after him for some time to find additional partners for his business, and the offer by Mr. Gervais was, as Mr. Gratton put it, "like money from heaven". He immediately offered to sell Mr. Gervais some shares in his company, even offering to update the company name to Gratton Construction (1983) Inc., to reflect the new participation of Mr. Gervais. Mr. Gervais responded, however, that if it was his money that was going to finance the new operation, that somehow ought to be reflected in the name of the company itself. The two agreed, therefore, to form the name "Grager" for the new company, drawing upon the first three letters of the last name of each of the two partners, and the company was to have a new bank, a new bonding company, and new solicitors. Mr. Gratton then raised the possibility of taking Charles Vandal on permanently to handle the formwork, and it was decided to cut Mr. Vandal in as a 25 per cent partner, in order to give him a more direct interest in the success of the company. This offer failed to lure Mr. Vandal into the fold, however, and the ultimate arrangement between the three was for each of them to be an equal partner in the profits of the new company. Each of the three also drew a salary for his work, and had a veto with respect to the level of salary to be paid to any employee of the company. Mr. Gervais said that he would look after the money as secretary-treasurer, since it was his money, and he told Mr. Gratton that he could be president. It was understood that Mr. Gratton would look after all of the engineering and estimating, and in fact all of the office work in general, and Mr. Gervais would operate the equipment, and assist Mr. Vandal in the supervision of the job sites. The only thing that Mr. Gervais insisted upon was that Mr. Gratton "leave his company on the shelf", and not compete in any way with the new enterprise. Mr. Gervais made a similar commitment, but in the circumstances, that was worth considerably less than the promise coming from Mr. Gratton. As Mr. Gervais put it: "I had the money — I needed his expertise, in bidding jobs, everything involved with the office". "And so", he was asked on cross-examination, "you were investing your money and he was investing his expertise?", to which Mr. Gervais responded: "Yes".

7. Because the partners wanted a Quebec licence for their company, the company used Mr. Gratton's home in Alymer, Quebec as its head office, just as Mr. Gratton had with his own company. The telephone number for the company was for a short period also Mr. Gratton's own telephone number, until arrangements were completed to put in a business line for the new company. The company's business line also rings in Mr. Gervais' home when Mr. Gratton does not answer. Mr. Gratton testified that people would sometimes be surprised when they telephoned the number for "Grager", and Mr. Gratton answered the telephone. Mr. Gratton would tell them he was still there, but had closed the old Gratton company and was now under the Grager name. Mr. Gratton reads the Daily Commercial News in search of job opportunities for the company, and prepares all the take-offs for bidding. Then, as Mr. Gervais put it, "the fight begins", as the three partners debate the final amount to be entered in their bid. Mr. Gervais has in fact been issued a special class of shares in recognition of his financing of the company, and is given the power to withdraw his investment (and effectively dissolve the company) any time that the balance sheet of the company shows a deficit of \$50,000.00. Mr.

Gervais' leasing company also supplies equipment to the new company as required. Any equipment which Mr. Gratton had in Pierre A. Gratton Construction Inc. remains in his garage.

8. Mr. Gervais acknowledged in his evidence that Mr. Gratton was experienced in bidding on Transit Way contracts, although that may have been intended by Mr. Gervais only to indicate that Mr. Gratton was the one experienced in bidding contracts generally. All of the work performed by the new company in Ontario to date, however, has consisted of the building of three bridges, under two separate contracts, for the Transit Way itself. The first job landed by the new company, in fact, involved an extension of the storm sewer culvert which Mr. Gratton had built under Greenbelt in the previous year, and required the building of a streetway over the trench. Mr. Vandal brought with him Mr. Claude Lahaie, the foreman and surveyor from the Greenbelt job (and the 1980 joint venture before that), and one or two of the better "Gratton" employees as well. Other former employees of Pierre A. Gratton Construction Inc. have also heard of the new company's jobs, and applied and been hired from time to time, together with employees not previously known. The new company has now completed the Transit Way contracts it successfully bid on, and currently has no further jobs underway.

9. On the basis of all of the foregoing, Labourers' Local 527 argues that both sections 63 and 1(4) are applicable to extend the bargaining rights which they held to the new company, Construction P.H. Grager Inc. The irony is that, had Mr. Gratton had his way, and Mr. Gervais agreed to Mr. Gratton's initial offer to simply purchase shares in the "Gratton" company that was already there, these proceedings would not have been necessary to continue the Labourers' bargaining rights. The question is whether the effect of what the principal parties have done is the same. It is clear that all partners in "Grager" participate in the critical decisions affecting the company to a degree that substantially dilutes the absolute control which Mr. Gratton formerly enjoyed under "Gratton". Whether, in these circumstances, section 1(4) can be said to apply need not be decided, for it is the opinion of the Board that what has occurred on the facts of this case is a "sale" of Mr. Gratton's general contracting "business" to the new company in which he is a partner, within the meaning of section 63 of the *Labour Relations Act*.

10. In this case the new company acquired virtually none of the physical assets of Pierre A. Gratton Construction Inc.. As the Board has noted in the past, however, the essence of a "business" in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in physical assets such as tools or a specific location. See, e.g., *Carroll Electric (1982) Limited*, [1982] OLRB Rep. Dec. 1814 at paragraph 11; *Jen-ry Utility Contracting*, [1984] OLRB Rep. Dec. 1724. And it was precisely these critical elements that Mr. Gervais looked to Mr. Gratton to provide — so much so that he was prepared to offer Mr. Gratton an equal interest in the profit of the company that Mr. Gervais was 100 per cent financing. And, in return, Mr. Gratton had to commit himself to put his own company "on the shelf", and not to compete with the "Grager" company in any way. Mr. Gratton, in other words, agreed for good and valuable consideration to fold the business that he had developed and was operating as Pierre A. Gratton Construction Inc. into the new company incorporated under the name of Construction P.H. Grager Inc.. The choice of name for the new company accurately reflects the "joint venture" aspect of the newly-created organization, but to put that label on the situation does not, in our view, fully answer the question of a "sale". While the roles played by Mr. Gervais and Mr. Vandal in the efficient operation of the new company ought not to be denigrated, neither, on the evidence, had developed a track record as general contractors which would qualify them as an arguable source of the "Grager" work. Combining the dominance, therefore, in "Grager" of the experience and expertise of Mr. Gratton (being the chief assets of Pierre A. Gratton Construc-



tion Inc.) in successfully acquiring work, with the agreement of Mr. Gratton to leave Pierre A. Gratton Construction Inc. "on the shelf" and carry on business only as Construction P.H. Grager Inc., the Board does not see this case as a simple "joint venture", in the way in which those words are often used. While, as the Board has stated on numerous occasions, the "related" and successorship provisions of the Act are not designed to multiply the number of discreet business undertakings to which a trade union's bargaining rights attach, it would not seem inappropriate that one or the other of those sections operate to preserve those rights in connection with what we find on the facts is essentially a continuation of the unionized "Gratton" business, at least during the period that "Gratton" itself remains inactive.

11. The employer argues, finally, that the business of the "Gratton" and "Grager" companies was sufficiently different that the Board ought to find no connection under either section 1(4) or 63. The evidence, and particularly that of Mr. Gratton, does not support that however. Common to all of the major jobs that Mr. Gratton has done is a significant element of concrete formwork, his "real love", and he himself acknowledges that sewer and watermain work is a common component of the bridge-building or "heavy construction" work he has always been engaged in. His focus on sewer and watermain work during the period of Pierre A. Gratton Construction Inc. we find to be more a reflection of the specific kinds of jobs available for bid during that period, as Mr. Gratton testified, rather than a different market focus for Mr. Gratton's talents, and the business he was attempting to carry on. And it has, in this regard, not escaped the Board's attention that the first contract obtained by the new company was in fact an extension of the specific Transit Way project worked on by Pierre A. Gratton Construction Inc. in 1983.

12. As noted at the outset, the extension of the Labourers' bargaining rights to Construction P.H. Grager Inc. means, in light of the overlapping work jurisdiction in formwork between members of the Labourers' and Carpenters' Union, that the Carpenters' application for certification is really a "displacement" application. As the parties recognize, therefore, the appropriate disposition of the certification application in such circumstances is to rescind the certificate issued by the Board in its decision of May 16, 1984, and to order a vote. Employees will be asked to choose whether they wish to be represented by Labourers' Local 527 or Carpenters' Local 93 in their employment relations with Construction P.H. Grager Inc..

13. The matter is therefore referred to a Board Officer to meet with the parties in order to make all of the necessary arrangements for the vote which, we find, ought to have been held at the initial stage of these proceedings.

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**2878-83-R; 2879-83-R** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Creeds Storage Ltd.**, Respondent, v. Employee, Objector

**Bargaining Unit — Practice and Procedure — Applicant seeking two bargaining units restricted to drivers and office and counter clerks respectively — Employees integrated with production work — Not doing pure drivers' or office functions — Units inappropriate — Practice of not including drivers in production unit in dairy, bakery and laundry industries only where work involving driving exclusively**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

**APPEARANCES:** *L. Steinberg, F. DaSilva and J. Watson for the applicant; Peter J. Thorup, Jack Creed and Jim Gray for the respondent.*

**DECISION OF THE BOARD;** February 12, 1985

1. These are two consolidated applications, the background to which is set out in a decision of the Board released May 3, 1984 (see, [1984] OLRB Rep. May 712). As that decision indicates, another trade union related to the applicant applied to the Board to be certified for a unit of "all employees" of the respondent in Metropolitan Toronto. The respondent agreed with that description of the bargaining unit, and a representation vote was held. The trade union lost the vote, and the Board imposed its normal six-month bar on applications affecting any of the employees in that unit.

2. The present applications were then brought within days of that earlier vote, this time seeking certification for two smaller segments of the respondent's work force, being "all drivers and drivers' helpers" on the one hand, and "all office staff and counter clerks" on the other. The Board ruled on the basis of its jurisprudence that the bar imposed against the trade union which had unsuccessfully sought certification for an "all employee" unit would not cause the Board to refuse to entertain the applications brought by the present applicant. The Board noted, however, that the principals involved on behalf of the two trade unions in both sets of applications, right down to the actual collection of membership evidence, were the same, and the fact that those principals had viewed the "all employee" unit as appropriate in the first application was not lost on the Board. That, however, was not an end to the matter, since the Board's jurisprudence has long recognized that there may be more than one "appropriate" bargaining unit, in the abstract, and the Board's task in each case is to ascertain whether the unit being sought can be said to be "appropriate" with respect to the particular application before it. See, for example, the decision of the Board in *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, at paragraph 17. It remained open, therefore, for the applicant to demonstrate to the Board that the present bargaining units it now sought to be certified for were, notwithstanding the position the same principals took in the earlier application, appropriate for *these* applications. To that end the Board appointed an officer to inquire into the community of interest which the employees covered by the present applications shared with the remainder of the respondent's employees.

3. The parties have in the Report of the Officer set out in a most helpful fashion the make-up of the respondent's work force, together with the actual lay-out physically of its operations. The respondent operates two locations in Metropolitan Toronto, one on Davenport Road and the other at Sherwood Avenue. Initially the business of the respondent Creeds Storage Ltd. was confined to the storage, cleaning and alteration of furs, but it subsequently was expanded into the dry-cleaning business as well. The Davenport location is the respondent's main location, and it houses both the fur storage facilities and the dry-cleaning equipment. To handle those aspects of the operation the respondent employs some 25 employees in the categories of pressers, finishers, cleaners, sorters, taggers, packers, maintenance, vaultman, and fur and non-fur repairers and seamstresses. The respondent also employs at the front end of that location five "clerical" staff which are a part of one of these applications, and these staff persons not only perform whatever office and computer-processing work is required for the business, but also serve at the same time as counter clerks to receive, tag, and hand out customer garments. In addition, the respondent employs out of the Davenport location nine drivers and helpers who operate a delivery service for the respondent between the Davenport location and customers' homes, as well as between the Davenport and Sherwood locations themselves. The Sherwood location is nothing more than a customer depot, and employs five clerical persons who perform simply the role of counter-clerks and taggers.

4. With respect to the drivers' application, the applicant concedes that the normal practice of the Board is to *include* drivers within a "production" unit, but points out that the exception recognized by the Board has been in the dairy, bakery and laundry industries. While agreeing with that characterization of its practice, the Board notes that the present application does not involve the kind of pure "route" drivers characteristic of these excepted industries. On the contrary, the evidence here discloses that the "drivers" have so much non-driving time available, varying with the seasons, that they are used on a regular basis to perform a multitude of tasks within the Davenport operation, including cleaning and minor maintenance, moving bins and racks to assist dry-cleaning staff, and participating, along with everyone else on hand (including clerical staff), in such occasional mass activities as re-numbering the furs left in storage from the previous year, and stuffing envelopes for promotional campaigns. They also, as part of their regular delivery function, normally move the bundles of garments between the front counter and "plant" operation, and assist the vaultman on a regular basis with the movement of garments in and out of the vault. There is as well, on the other side of the coin, one employee hired as a driver who transferred into the dry-cleaning operation, and who still drives for the respondent on occasion when required. But more significant than all of this is the fact that *all* of the cleaning of furs, a significant part of the respondent's "production" operation, is done by drivers, in the second-floor area of the plant reserved for that function. The fact that the drivers are paid for this aspect of their job on a piece-work basis is scarcely a sufficient ground on its own for separating the respondent's production facility into separate departmental bargaining units. Viewing the evidence of the driver's job as a whole, no compelling case whatever can be made for splitting the drivers and drivers' helpers off as a separate bargaining unit, or treating them as an appropriate unit for the purposes of this application.

5. With respect to the second application, for "office staff and counter-clerks", the respondent concedes that the presumption in some respects is the other way; i.e., the Board normally recognizes the appropriateness of an "office" unit separate and distinct from a "production" unit. See, e.g., *H. Gray Ltd.*, 55 CLLC ¶18,011. But, as the respondent points out, this is not a normal industrial or "production" type of establishment, nor are we dealing with pure "office staff" in the normal sense of the word. While the clerks employed at the Davenport location do perform such office and accounting functions as are required for the



operation, we find that the bulk of their time is spent handling the customers' garments across the counter, and acting as a liaison with the back in providing service to the customer. Even the witness put forward by the applicant, Maureen Clarke, estimated her time spent on the computer portion of her work as of the relevant date at only forty per cent, the remainder of her time being taken up with servicing the front counter and answering customer inquiries on the telephone. The bulk of the clerical staff's time overall is spent in essentially the first and last stages of the handling of the customers' goods, first in receiving, sorting, and invoicing the garments, and then in locating and returning them to the customer. In the case of the clerical staff located at Sherwood Avenue, *all* of their time is spent on these aspects of the respondent's "assembly-line" process. How much of the Davenport Road staff's time is spent on the intermediate stages handling the customer's goods is a matter of circumstance. If a customer's order is not on the "ready" racks when the customer calls in for it, the counter-clerk must go into the "plant" area, either tracking it down herself at one of the work stations or, if unsuccessful, enlisting the aid of a supervisor or other employee. Mr. Gray and Mr. Creed, the respondent's witnesses, put this occurrence at a minimum of fifteen times a day, while the applicant's witness, Ms. Clarke, was prepared to concede the possibility of a third to a half of that frequency. The counter staff also work somewhat later hours than the "plant" staff, to coincide with the normal traffic hours of the public, and are required to "package" the order as well when retrieving it from the back at a time when the plant area is not operating. There is also a "tagging" stage which takes place in the plant itself, consisting of the sorting and ticketing of a customer order by cleaning type, and the clerks at the Sherwood Avenue location perform this function themselves on all of the orders which are brought in to that location. There was, in addition, a clerk (Sylvie Saumur) hired at the Davenport Road location to work in both the plant and the office, and since the time that her work station has been physically moved from the plant to the office, she has continued to go back into the plant to assist the "taggers" in their work when required. For what its worth, the counter-clerks may also call the alterations personnel to the front to assist in taking the customers' instructions and measurements, as required.

6. Apart from the slight variation in hours, the applicant points out that the front clerical staff are the only group of employees without their own uniform, deal directly with the public, and are paid a commission for any fur-servicing they are able to "sell" to the customer. The latter two attributes, however, do not distinguish them from the drivers, who in the particular circumstances of this case have been found not to be severable from the main group of employees for the purposes of collective bargaining. The applicant further points out that the skills required by the clerical staff for the computer and accounting aspects of their jobs are distinct from those required by other employees, and that they do have a "supervisor" within their group (although, from the list filed, apparently not "managerial") to whom they report.

7. On the other hand, the respondent points out that no distinctions are made in company policy or benefits between the "plant" and the "office", and that all employees share a common punch-clock and lunchroom. It is clear that a specific policy for the payment of overtime has been developed for employees at least in the office group, but no need for overtime had yet arisen as of the date of the application for employees working in the dry-cleaning area. The only difference which does exist amongst employees in benefit policy is the payment of the *full* OHIP premium for employees taken on by the respondent through the purchase of another company, but the respondent prior to that made no taken on from the other company have themselves been "intermingled" throughout the respondent's organization.

8. On all of the evidence, the Board is not persuaded of the appropriateness of a bargaining unit solely for the office and counter-clerks of the respondent in the application now before it. There is no “pure” office area in this particular operation, and all of the respondent’s employees appear to be engaged in one continuous process of handling the customers’ garments, the employees in the various areas of the premises interfacing with and assisting each other as a regular part of their jobs. Given the dual nature of the work of these “clerical” employees, and their close integration with the work of the “production” employees, the Board does not find them to be wholly dissimilar from the kind of “plant clerical” staff frequently included in a production unit, albeit where a free-standing “office” unit is assumed to exist as well. See, e.g., *Domtar Chemicals Limited*, [1968] OLRB Rep. Oct. 719; *Fildebrandt Precision Industries Limited*, [1983] OLRB Rep. March 361, at paragraph 22. And consistent with the integrated nature of the work process, no separation has historically been drawn by the respondent in its treatment of the various groups of employees. In all of the circumstances of this case, no compelling reason has been demonstrated to the Board to now split the respondent’s work force into separate pockets of bargaining, and the Board finds that a unit composed solely of office staff and counter-clerks would be inappropriate as well.

9. Having regard to the full list of employees filed in this matter, the Board finds that the applicant’s level of membership support in its applications either singly or combined falls short of the required 45 per cent required, and both applications are accordingly dismissed.

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**1296-82-U; 0195-83-U Luciano D’Alessandro and Donato Marinaro, Complainants, v. Labourers’ International Union of North America, Local 1089, and Rocco D’Andrea, Respondents**

**Evidence — Practice and Procedure — Proper scope of reply evidence reviewed**

**BEFORE:** Robert D. Howe, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Ed J. Brogden for the complainants; A. M. Minsky, R. D’Andrea and D. D’Andrea for the respondents.*

**DECISION OF THE BOARD;** February 14, 1985

1. The purpose of this decision is to provide, in written form, certain unanimous oral rulings given by the Board on February 8, 1985 in respect of these consolidated matters, as requested by counsel for the complainants.

2. During the continuation of hearing of these consolidated complaints on February 7, 1985, counsel for the complainants and counsel for the respondents made various submissions to the Board concerning the proper scope of reply evidence. After recessing for the evening to consider those submissions, the Board made the following unanimous oral ruling at the commencement of the continuation of hearing on February 8, 1985:

Since the majority of the Board's hearing time yesterday was taken up by submissions of counsel concerning whether or not certain evidence could properly be adduced as reply evidence, it may be useful for the Board to rule not only on the specific point which has been argued (most recently), but also to provide a more general indication of what we perceive to be the proper scope of reply evidence. During his submissions in support of his contention that evidence concerning the Union meeting of May 12, 1983 may properly be called in reply, counsel for the complainants contended that he could call certain witnesses to testify about that meeting as part of his case in chief and hold another witness in reserve to be called in reply in the event that the respondents called witnesses to contradict evidence on that point given by the complainants' witnesses in chief. Apart from a general reference to *Phipson on Evidence*, without referring the Board to any particular page or passage in that text, counsel cited no authority for that proposition.

It is well established in the law of evidence and in the Board's jurisprudence that a plaintiff or complainant cannot split his case in the manner suggested by counsel for the complainants. As noted in *Phipson on Evidence* (12th Ed. 1976) at paragraph 616, "[e]vidence in reply . . . must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff. See also *Wilco-Canada Inc.*, [1983] OLRB Rep. Jan 165, in which the Board wrote as follows at paragraph 13:

The normal scope of reply evidence is aptly described in the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at page 517:

"At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:

'. . . first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case [he] had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning' [6 Wigmore on Evidence, s. 1873, p. 511]."

(See also *Allcock Laight & Westwood Limited v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.).

Counsel for the complainants has contended that this, and various other evidence which he seeks to adduce as reply evidence, is admissible for the purpose of impugning the credibility of witnesses called by the respondents and, in particular, of Dan D'Andrea. Impugning the credibility of a witness called by a respondent is, of course, a legitimate function of reply evidence, but, as contended by counsel for the respondents, it is subject to a number of limitations, including the following:

- (1) the aforementioned fundamental principle which requires that reply evidence relate to *new* facts or issues raised in defence, and which prevents a complainant from splitting his case;
- (2) the requirement, often referred to as the rule in *Browne v. Dunn*, by which (to quote from paragraph 1593 of *Phipson on Evidence*) "[w]here it is intended to suggest that a witness is not speaking the truth upon a particular point his attention must be directed to the point by cross-examination so that he may have an opportunity of explanation; see also Sopinka and Lederman, at pages 512 and 513, which read, in part, as follows: "If counsel is considering the impeachment of the credibility of a witness by calling independent evidence, he must confront the witness with this evidence in cross-examination while he is still in the witness box"; and



- (3) the collateral fact rule which, subject to certain exceptions, provides that "answers given by a witness to questions put to him on cross-examination concerning collateral facts are treated as final and cannot be contradicted by extrinsic evidence": see Sopinka and Lederman at pages 511 and 512, in which it is also noted that "[w]ithout such a rule, there is a danger that litigation will . . . be prolonged and become sidetracked and involved in numerous subsidiary issues. Avoiding any unwarranted prolongation of proceedings is always a legitimate consideration in Board proceedings, and this is particularly true in the present case, which has already continued for in excess of thirty days of hearing over a period of eighteen months.

Those well known rules and principles have evolved over the centuries as part of the common law, and have generally been adopted by the Board, as master of its own procedure, in the interests of fairness to all of the parties and witnesses who appear before it.

In the absence of the written agreement (dated August 24, 1984) entered into by counsel for the complainants and counsel for the respondents, the complainants would be precluded from adducing, as reply evidence, evidence which is merely confirmatory of evidence called by the complainants concerning the May 12, 1983 meeting as part of their case in chief. Although it is far from certain that paragraph 1(b) of that agreement was intended to change that situation, that paragraph is somewhat ambiguous and can arguably be construed to permit such evidence to be adduced by the complainants as reply evidence, and by the respondents as what has been described by counsel as "surrebuttal evidence", following such reply evidence, as contended by counsel for the complainants. Under the circumstances, we are prepared to adopt that approach in the interests of fairness and in order to avoid any possibility of surprise to the complainants or respondents.

3. At 2:00 p.m. on February 8, 1985, the Board ruled as follows:

Having considered the submissions of the parties, we are not satisfied that the evidence concerning the meeting of September 8, 1983 which complainant's counsel seeks to adduce as reply evidence through Gerry Varrichio could not, through the exercise of due diligence, have been adduced as part of their case in chief, as was done through the testimony of Frank Garrett on October 18, 1984, particularly in view of the fact that Mr. Minsky notified Mr. Garrett during cross-examination that he intended to call Dan D'Andrea to contradict Mr. Garrett's evidence in respect of that matter. Failing that, we are not satisfied that through the exercise of due diligence, in preparing for his cross-examination of Dan D'Andrea, complainant's counsel could not have placed himself in a position to satisfy the requirements of the rule of *Browne v. Dunn* in respect of that evidence. In this regard, we note that at the request of complainants' counsel, the hearing was recessed on December 12, 1984 one and one half hours in advance of the time to which the Board had earlier indicated it was prepared to sit, in order to afford complainants' counsel time to prepare for his cross-examination of Dan D'Andrea. When the hearing resumed on the following morning, complainants' counsel made no suggestion that he had not had sufficient time to prepare for that cross-examination or to explore any appropriate avenues of investigation with respect to it. Accordingly, we are of the view that this evidence cannot properly be called in reply, either on the basis of the rule which precludes a complainant from splitting his case, or on the basis of the rule in *Browne v. Dunn*, as explained in our earlier ruling today. Accordingly, Mr. Minsky's objection is upheld.

4. At approximately 2:45 p.m. on February 8, 1985, the Board made the following ruling, after recessing to consider the submissions of the parties:

Counsel for the complainants seeks to adduce, as reply evidence, evidence that the respondent Rocco D'Andrea "offered office and position to certain people if they could get this case terminated". Complainants' counsel concedes that the alleged attempt was unsuccessful. The only basis on which he suggests that this evidence is relevant is, in effect, that a respondent would not seek to resolve a case in such manner unless he had violated the *Labour Relations Act*. However, we view that to be a *non sequitur*; settlement efforts

take place not only in respect of cases which would be lost if litigated, but also in respect of cases which would be won, as the cost of litigation, particularly in protracted cases of this type, is a factor which generally prompts parties to consider settlement. While we certainly would not condone activity of the type alleged by complainants' counsel, and while it may be that it could appropriately form the basis for other proceedings, we are not persuaded that it legitimately forms any part of the subject matter of these proceedings.

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**1493-84-R** United Steelworkers of America, Applicant, v. **Elks Inc.**, Respondent, v. Group of Employees, Objectors

**Certification — Petition — Practice and Procedure — Originator of petition first name on petition — Not receiving acknowledgement of receipt of petition from Board — Whether Form 6 notice as to consequences of failure to appear adequate — Only witness testifying about petition not credible — Failure of originator to testify leaving gaps as to origination and circulation — Petition not given weight — Board reviewing policy on petitions**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and L. Lenkinski.

**APPEARANCES:** *Keith Oleksiuk, Phil Falbo and Tom Ruddock for the applicant; Barbara G. Crosby, Scott Thompson, Jim Walker and Rick Bailey for the respondent; Kamash Ramnarine and Norman McFarlin for the objectors.*

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER L. LENKINSKI; February 5, 1985**

I

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having heard and considered the representations of the parties, the Board finds that the unit of employees appropriate for collective bargaining should be framed as follows:

All employees of Elks Inc., at its distribution centre in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, display staff, buyers, quality control personnel, and persons regularly employed for not more than twenty-four hours per week.

4. Apart from the Board's ruling with respect to the *description* of the bargaining unit, there remains an issue as to its precise *composition*. For reasons which need not be reviewed at this point, the union contends that four individuals on the employer's employee list should be excluded from the unit, while the employer asserts the contrary. However, the parties were

in agreement that the Board should first consider the effect (if any) to be given to a statement filed by certain employees and purportedly indicating opposition to the applicant's certification.

## II

5. In support of its application for certification, the trade union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the above-mentioned bargaining unit regardless of the determination of its ultimate composition. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing.

6. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and contents of this evidence are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote.

7. There was also filed with the Board a "statement of desire" or "petition" signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were "members" of the union within the meaning of section 1(1)(l) of the Act. From the terms of the petition one could infer that these individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant's certification. It was apparent that if the change of heart was a voluntary one so that the union's documentary evidence may not accurately reflect the employees' subsequent wishes as at the terminal date, the Board, in accordance with its usual practice, would exercise its discretion to order a representation vote to resolve the question of the applicant's certification. This is the course of action urged upon us by both the respondent employer and the employee objectors. They argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses) are still insufficient to indicate the employees' real intentions — even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations.

8. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees — subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving



the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a “union member” and the “question” the Board was to ask itself in this regard which prompted section 1(1)(1)). There is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(1) and 103(2)(j) to the special circumstances of particular cases — as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate a “clear majority” (i.e., more than fifty-five per cent) or where, in the Board’s discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

9. On the other hand, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards, and in others they are irrelevant because the preferred method of testing employee wishes is a representation vote, Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely “petition” or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

10. The Board recognizes that “statements of desire” (see Form 6), usually in the form of a “petition”, are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice. And, in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these “members” (in accordance with section 1(1)(1)) continue to support the union’s certification.

11. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the

change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union.

12. Frequently, as in the present case, such petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary — although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or to undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable.

13. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement.

The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, wherein the Board has recently reaffirmed its approach to such employee statements.

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures places on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

Before turning to the evidence in this case it might also be useful to review some of the "mechanics" of the certification process.

### III

14. On an application for certification, the Board fixes a terminal date for the receipt of documentary evidence of union membership or employee opposition to the application, and the employer is required to post a Notice to Employees, in Form 6, in a prominent place (or places) on its premises where the Notice will most likely come to the attention of the individuals potentially affected by the application. After describing the bargaining unit claimed by the



applicant to be appropriate and identifying the terminal date (here, September 19, 1984), the Notice provides:

• • •

4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. The statement of desire must be,

- (a) received by the Board **not later** than the terminal date shown in paragraph 3; or
- (b) if it is mailed by **registered mail** addressed to the Board at its office, 400 University Ave., Toronto, Ontario, M7A 1V4, mailed **not later** than the terminal date shown in paragraph 3.

6. A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

7. Any employee, or group of employees, who has informed the Board **in writing** of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

**THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT FURTHER NOTICE AND WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILED TO ATTEND.\***

8. No oral evidence of membership in a trade union, or of objection by employees to certification of the applicant will be accepted by the Board except to identify and substantiate such written evidence.

9. AND FURTHER TAKE NOTICE that the hearing of the application by the Board will take place at the Board Room, 400 University Ave.,

Toronto, Ontario, on Friday the 28th day of September, 1984, at 9:30 o'clock in the forenoon. (EDT).

10. THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

11. If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings.

• • •

**\*EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.**

The notice to employees largely reflects Rule 73 which reads, in part, as follows:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
  - (i) the return mailing address of the person who files the evidence, objection or signification, and
  - (ii) the name of the employer; and
- (b) is filed no later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

• • •

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witnesses as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

Finally, what is contemplated is set out explicitly in the laymen's guide entitled "*A Guide to the Labour Relations Act*" published by the Board and available at the Board or Ministry of Labour offices. Similar information is contained in the pamphlet entitled "Certification by the Ontario Labour Relations Board", which is also freely available to members of the public. At page 32 of the *Guide*, one finds the following:

*A representative of the signing employees must appear and call witnesses to testify under oath about how the statement of desire originated (whose idea it was, who drafted it and where) and about the manner in which each of these signatures was obtained.* This means that evidence must be given about the circumstances under which each employee signed the statement of desire by someone who was present at the time. Through all this, the Board makes certain that the names of the employees on the statement of desire are not revealed to the employer or the union. Reference is made only to a number placed beside each of the signatures by the Board. No member of management should be present when employees are asked to sign the statement, and it is essential that employees do not have the impression that management will be shown or told who signed the statement and who did not. Signatures should not be obtained on work-time, and in fact it is best that signatures be obtained away from the premises of the employer altogether, if that is possible.

The persons who present the evidence at the hearing will be questioned by the Board, and may be questioned by the representative of the union and the employer. If at the end of the enquiry the Board is not satisfied that the statement of desire is a voluntary expression of the employees who signed it, it will be disregarded.

(emphasis in original)

#### IV

15. In the instant case, an employee statement indicating opposition to the union was received on September 20, 1984, but, having been mailed by registered mail, was deemed by the Rules to be filed prior to the terminal date. By letter dated September 21, 1984, the Registrar wrote to the individual ("p2") appearing as the second signature on the first page of the document to acknowledge receipt. We do not think anything turns on this acknowledgement, since it is not disputed that the document was properly filed with the Board prior to the terminal date (although it is not entirely clear why the acknowledgement of receipt was sent to the second individual on the list rather than the first one). In any event, the employees were all given the required Form 6 Notice set out above, and Mr. Norman McFarlin appeared on behalf of the petitioners at the Board hearing on September 28, 1984, to give the evidence contemplated by the Rules. He was the only employee representative to attend and enter an appearance — despite the terms of the Form 6 posting which warn that employees who do not attend the scheduled hearing will not be entitled to any further notice in the proceedings, and the advice that employee representatives should be in a position to explain to the Board the origination of the employee statement and the manner in which each signature thereon was obtained. While any employee in the bargaining may intervene and become a party, only those who actually do so are entitled to continuing notice of the proceedings.

16. On September 28 the parties and their representatives met with a Labour Relations Officer and settled the bargaining unit except for the position of the single part-time employee and the status of three individuals — two of whom the applicant challenged as being excluded from the unit by virtue of section 1(3)(b) and one who was said to be an office employee. The parties were advised that it would be necessary for them to appear before a panel of the Board to make representations and/or give evidence on the issues still outstanding in the application. However, the case was not reached on September 28th. It was necessary to reschedule the hearing for continuation on a later date. Mr. McFarlin received notice of the continuation of hearing. Through an apparent clerical error, so did p2. She was copied on the letter and notice sent to Mr. McFarlin even though she had not appeared at the first hearing. No notice was sent to any other non-appearing employees, and, unlike our dissenting colleague, we do not think an erroneous and unnecessary notice sent to p2 creates any positive obligation to send



continuation notices to any or all of the other employees who chose not to appear at the original hearing. Nor do we think it relieves Mr. McFarlin of his obligation to put before the Board credible evidence concerning the origination, preparation and circulation of his petition. If p was a key participant she should have been present to give evidence both at the first hearing day and on the day the proceeding was continued.

17. Mr. McFarlin was the only employee who sought to give evidence concerning the origination, preparation or circulation of the petition. In accordance with the Board's usual practice, Mr. McFarlin's evidence was taken under oath, and was subject to cross-examination. We should note, however, that because of section 111 of the Act, Mr. McFarlin was not required to reveal the names of the individuals who had signed the petition documents, nor were counsel for the union or employer permitted to cross-examine on that matter. The names on the petition documents were assigned numbers (p1, p2, p3, etc.) and Mr. McFarlin was instructed to refer to those numbers instead of employee names when giving his evidence concerning the origination, preparation and circulation of the petition. This procedure may restrict the union's right to cross-examination in some respects, but it is a longstanding Board practice and, the only one which, in our view, appropriately harmonizes the right to inquire into the origin of an employee statement in opposition and the right of the employees to confidentiality. The Board conducted the initial enquiry contemplated by the Rules because only the Board has custody of the employee statement in opposition. Only the Board knows the names of the signatories, and only the Board sees such things as handwriting styles, erasures or additions which may prompt inferences about how the document originated or was handled. For example, in *Conair Canada Limited*, [1982] OLRB Rep. Feb. 159, the presence of two different typefaces on a document prompted a question concerning its preparation, and eventually led to a witness admitting that he had earlier lied about who had typed it. Where a witness' evidence is unclear or inconsistent with what appears on the document or what he has already said, the Board seeks clarification. No objection was taken to this procedure.

18. In assessing the testimony of "rank and file" employees, the Board has not adopted an unrealistic standard. It recognizes that an untrained witness (particularly if he is without counsel) will not have perfect recollection and will occasionally have difficulty recalling or articulating precisely what happened. On the other hand, the testimony should be consistent and generally plausible. Gaps, inconsistencies, or unexplained circumstances may well bear upon a witness' credibility — particularly where, as here, the Board has to determine whether the purported employee opposition is free from the actual or perceived hand of management. These factors, together with a witness' demeanour, responsiveness, and performance in cross examination must be taken into account in determining what weight to be given to the testimony, and, in turn, whether the Board should exercise its discretion to direct the taking of a representation vote, notwithstanding the union's showing of membership support among more than fifty-five per cent of the employees in the bargaining unit. In this regard, Mr. McFarlin's evidence was far from satisfactory. To put the matter bluntly: neither his "story" nor the manner in which he repeated it had the ring of truth.

19. It is necessary to describe certain physical characteristics of the documentary evidence.

20. The petition document consists of four pages. Pages 1 and 3 are handwritten (apparently in a single hand), and have somewhat different headings. Page 2 is a photocopy of part of page 1 (or perhaps page 1 in an earlier version) to which have been added, again in part, words which appear on page 1. Page 4 contains a single signature in an entirely different hand.

Accompanying each employee signature is his/her address and adjacent to each signature is a carefully printed version of the employee's name. With one exception, the printed clarifications also all appear to be in a single hand.

21. Mr. McFarlin has worked for the respondent for about five months. He testified that he did not see the Form 6 Notice until the morning of September 14th. At lunchtime, he was approached by p1, an employee who works at the computer. Mr. McFarlin said he assumes she drafted the original petition documents. According to Mr. McFarlin, p1 gave him the first and third pages and on page 1 the signatures of p1 and p2 were already present. Mr. McFarlin signed as p9 at the top of the third page, then proceeded to solicit the signatures of p6 and p7 appearing on page 1, and p12, p16, and p17, appearing on page 2 — the xerox copy. We might note that the numbering to which we refer reflects the order in which the signatures appear on the page and that a number of signatures were solicited by a person (or persons) other than Mr. McFarlin, in circumstances of which he said he had no knowledge.

22. The second page of the petition document, the photocopy, poses some difficulties. According to Mr. McFarlin, he made the photocopy himself on Friday, September 14th. But, if that is so, he could not explain why the photocopy is not a "true copy", which would include the copied signatures of p1 and p2 which were supposed to be on the first page when Mr. McFarlin received it from p1, its apparent author. Nor did Mr. McFarlin know when or how certain words in the preamble came to be added to the photocopied page 2 to make it match, or why the word Board is written over a word which has been "whited out", or how the helpful printed names adjacent to the signatures came to be placed on the documents. This is curious, because the same printed names appeared on page 3 and Mr. McFarlin maintains that that page (bearing his own signature at the top) never left his possession. This he stated twice. Later he said that he gave the third page back to p1, but he did not know when or why or recall when he got it back. He said that the printed clarification on page 3 was present when he received the document back on Tuesday for the purpose of soliciting further signatures — which poses more difficulties because two of those signatures were supposedly solicited later that day (p10 and p11), but they too have the printed clarification. So does the signatures of p16 and p17 who, according to Mr. McFarlin, signed the document on Tuesday, September 18th after work. He was unable to advance any explanation how those particular clarifications came to be placed on the document which was then in his sole possession.

23. Mr. McFarlin's evidence respecting the envelope in which the petition was mailed, is also a little unusual. He says that he obtained the envelope (stamped with the employer's address) from a supply cupboard, put all the documents in it, then took it back to p1 to affix the proper address. He left it with her then picked it up again later. He did not write it out himself, he said, because her writing was better than his. But Mr. McFarlin's printing on the appearance forms filed at both hearings is perfectly legible and since the whole exercise would take less than a minute, it is difficult to understand why he was not present when the address was placed on the envelope. He did not know where the address information came from and said that he registered the letter so that it would not get lost. If he appreciated the legal significance of registration, he did not so indicate. He did say that he did not know how the original petition document originated, what p1 may have done, who may have assisted her, or the circumstances in which the other signatures on the document were collected.

24. In cross-examination, Mr. McFarlin testified that he never spoke to anyone from management about the petition and never said to any employee that "the company" had asked him to take it around. He said that he only approached those who ultimately signed by the

petition. He approached no one else. When pressed by counsel for the union, he retorted that he knew that if the company had been mentioned “he wouldn’t be here” — i.e.: that company involvement would taint the exercise. When asked where he got that idea, he initially refused to answer, then said that he obtained this information from a lawyer whom he had phoned, to make an appointment before the petition was circulated. This was the first mention of any legal advice or, indeed, any advice as to how he should go about his task. He said he needed to know what to do and say before he decided to circulate the petition document — a submission which is a little difficult to square with his testimony that the document was drafted by p1 (apparently as her idea) and began to be circulated on Friday, September 14th, the very day on which the Form 6 Notice was posted. Subsequently, he said that he knew nothing about the petition until the Notice was put up, and that he had no prior advice from counsel. This whole interchange was unusual, and, in the end, implausible.

25. At the conclusion of Mr. McFarlin’s evidence, he was asked if he had any further evidence to lead respecting the origination, preparation or circulation of the petition. He indicated he did not. The Board did not suggest to him that if he did not lead further evidence to support his own, and to fill in any gaps, his position might not be sustained; nor did the Board suggest to him that he could or should seek an adjournment to seek further evidence to bolster his case. We do not know why p1 was not called, given her central role in the origination and subsequent circulation of the petition, and the advice in Form 6 that her evidence would be required.

26. Garry Manuel had a different recollection of at least one conversation with Mr. McFarlin during the time when he was circulating the petition opposing the union. According to Mr. Manuel, McFarlin approached him and said that the company had asked him [McFarlin] to take up the petition to keep the union out, then inquired whether Manuel would be prepared to sign it. Manuel demurred, suggesting that he would prefer to think about it. Later in the day, McFarlin approached him once again. Once again, Manuel refused to sign, and told McFarlin that he (Manuel) did not think that the company should be involved. This time McFarlin denied any company involvement.

27. Before the Board, McFarlin denied these statements attributed to him by Manuel. We prefer Manuel’s evidence.

28. It is difficult in these reasons to capture the real “flavour” of McFarlin’s evidence, since the Board is obviously influenced in its assessment by his demeanour, the pattern of his responses, the apparent inconsistencies or curiosities and the contradictions on such points as whether McFarlin approached persons other than those who signed or ever said that he was acting at the request of the company (which in both cases he denied). It suffices to say that having regard to the totality of McFarlin’s evidence, we did not find him to be a credible witness; and there was no one else called to explain the origination, preparation or circulation of the petition documents — in particular, p1 who seems to have had a pivotal role. Accordingly, we are not satisfied that we should give the petition any weight or rely upon it to support the exercise of our discretion to order a representation vote.

29. As we have pointed out earlier, there is a remaining dispute between the parties as to whether four individuals should or should not be included in the above-described bargaining unit. The Board has determined, however, that regardless of the resolution of this dispute, the union will ultimately be entitled to certification. In other words, whether or not the four disputed individuals are included in the bargaining unit, more than fifty-five per cent of the employee.



of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 19, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

30. Having regard to the foregoing, the union will be certified on an interim basis in respect of the bargaining unit described in paragraph 3 above. A final certificate must await a resolution of the dispute concerning the composition of the bargaining unit and, in particular, the status of the following four individuals:

S. Binns  
L. Chaupiz  
V. Florez  
P. Singh.

A Board Officer is hereby appointed to inquire into the duties and responsibilities of these individuals and their community of interest, if any, with the other employees in the bargaining unit.

31. In view of the Board's assessment of the evidence concerning the petition opposing the union, it is unnecessary to hear or consider the evidence of those individuals who have signed it and subsequently executed a further document revoking or cancelling their support for the objectors.

#### DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I cannot agree that a decision should be rendered at this time. I feel that a necessary party was not given adequate notice of the proceedings before the Board.

2. A petition was received by the Board by registered mail. In the normal course, the Board would send an acknowledgement to the person who signed any covering letter, and failing that, to the person whose name is first on the list of objecting employees (Employee #1). In this case, the letter of acknowledgement was sent to the employee whose name appeared second on the list (Employee #2).

3. On the day set for hearing, Mr. McFarlin, one of the "originators" of the petition, showed up at the Board. Employee #1 and Employee #2 did not come. The matter did not come on before the Board for a hearing on that day. The hearing date was rescheduled and notices were sent to Mr. McFarlin and Employee #2. By agreement of the parties, it was adjourned and again rescheduled and again notices were sent to Mr. McFarlin and Employee #2.

4. When the matter finally came before the Board for hearing, Mr. McFarlin and Employee #2 attended. It would appear that Employee #2 attended because she was concerned about all the notices she was receiving, and thought that the Board wanted her to attend at the hearing. Employee #2 was not an "originator" of the petition.

5. When Mr. McFarlin gave his evidence, it became clear that Employee #1 was an originator of the petition and that her evidence was germane if not crucial to the position of the employee objectors.

6. Following a spirited cross-examination of Mr. McFarlin by the Vice-Chairman, the majority has decided that Employee #1 received adequate notice of the proceedings before the Board and must be taken to have chosen not to appear. The majority accept Form 6 as being adequate notice to all the employee objectors. Suffice to say that in the *Fuller's Restaurant* case that form was found sadly lacking in particularity and was the subject of express judicial comment concerning its content. It just doesn't do the job that the Board assigns to it.

7. I fail to see how Form 6 can have any applications to the facts before us. The hearing did not take place on the date shown on the form. It was rescheduled and Employee #1 was not advised of the new hearing date.

8. Because of what happened here there simply had to be confusion in the minds of the employee objectors as to what was expected of them (e.g., the appearance of Employee #2, who had no evidence to give that was relevant to the issues). It is fundamental that adequate notice be given to all interested parties (especially laymen), and that the Board now sow the seed of doubt in anyone's mind as to whether it is necessary for him or her to attend.

9. I would reschedule the hearing so that proper notice can be given to every person who is a party.

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**1098-84-R** Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, Applicant, v. **Essex County Automobile Club**, Respondent, v. Group of Employees, Objectors

**Bargaining Unit — Practice and Procedure — Unit consisting of drivers and several other classifications — Whether dispatchers having community of interest with unit employees — Board applying *Usarco* tests and finding community of interest present**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members A. Grant and P. Grasso.

**DECISION OF THE BOARD;** February 6, 1985

1. By decision dated December 21, 1984, in which Board Member A. Grant hereby concurs, the Board found that the dispatchers do share a community of interest with the classifications in the bargaining unit, and thus, are an appropriate inclusion in that unit. In accordance with paragraph 5 of that decision, the following are the reasons for the Board's determination.

2. The Board has reviewed the testimony of Ann Wright, a dispatcher employed by the respondent, as set out in the report of the Board Officer. The parties were afforded full opportunity to examine and cross-examine the witness. Further, the parties were given an opportunity to call further witnesses but none were so called. The facts, as elicited through Wright's testimony, were not in dispute although the parties differed as to the importance of the various facts and the impact of those facts in light of the jurisprudence.

3. The respondent organized its submissions as follows:

(a) The nature of the dispatcher's work is distinguishable from that of the agreed bargaining unit;

(b) The working and pay conditions are more closely aligned with a clerical and office unit than that with the agreed bargaining unit;

(c) The skills required of the dispatcher are different from those skills required of members of the agreed bargaining unit;

(d) The intermingling of job function and employees of both bargaining unit and non-bargaining unit drivers, including independent contractors and clerical employees dictate a community of interest other than that with the agreed bargaining unit;

(e) The source of work and the method of assigning work raises a potential for conflict between the dispatchers and others placed in the agreed bargaining unit;

(f) The dispatchers are responsible for the security of the building during certain of the business hours.

Examples were given from Wright's evidence in support of each of the above propositions. The respondent also relied on *Hamilton Automobile Club*, [1984] OLRB Rep. Jan. 35. In that decision, the Board found that a bargaining unit composed solely of dispatchers would not be appropriate for collective bargaining purposes. In paragraph 8, however, the Board also stated "... the Board is satisfied on the undisputed facts asserted by the respondent that dispatchers share a greater community of interest with office and sales staff than with tow truck operators." The respondent submitted that, in the instant case, as the employment conditions and circumstances were on all fours with those in *Hamilton Automobile Club*, *supra*, this Board should likewise conclude that the dispatchers share a greater community of interest with the office and clerical staff and should be excluded from the bargaining unit.

4. The applicant submitted the *Hamilton Automobile Club* case, *supra*, was distinguishable. In *Hamilton Automobile Club*, there were already two bargaining units (one of in-car driving instructors and one of tow-truck operators). The application was for a third unit consisting solely of dispatchers. The Board in *Hamilton Automobile Club* rejected such a unit as appropriate to avoid undue fragmentation. The applicant submitted the Board in *Hamilton Automobile Club* should not have gone further than what was necessary for the decision to comment on the community of interest issue. Here, however, the respondent was unorganized, operated on a small scale and the application was for an all employees unit (i.e., full and part-time). Further, the applicant asserted *Hamilton Automobile Club* had not decided that dispatchers had no community of interest with ERS drivers as that question had not been before that Board and, thus, this Board could find such a community of interest based on the facts in the instant case. The applicant also reviewed the conditions of employment and other employment circumstances of the dispatchers to illustrate the asserted community of interest with the bargaining unit. Finally, the respondent asserted the proper test was whether there was a community of interest between the dispatchers and the bargaining unit not whether there was a greater community of interest between the dispatchers and the office staff.



5. Given that the “bottom line” decision has already issued, the Board has not listed the examples cited by counsel in support of their respective positions. Further, as the facts, as contained in the Board Officer’s report, were not in dispute, the Board has not set out the facts separately but rather incorporated them into the analysis. The Board also notes that, while the bargaining unit includes several classifications (see paragraph 7, *infra*) the Board generally refers to the agreed unit as “drivers” in assessing the facts in accordance with the criteria below.

6. The criteria enunciated in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 have been accepted as the appropriate tests to assess the community of interest amongst employees. For convenience, those criteria are summarized:

- (a) nature of work performed;
- (b) conditions of employment;
- (c) skills of employees;
- (d) administration;
- (e) geographic circumstances;
- (f) functional coherence and interdependence.

7. The parties had agreed upon a bargaining unit consisting of several classifications: emergency service drivers (ERS drivers), tow-truck operators, day care drivers, mechanic, “utility” person (referred to as a “gofer”). The Board intends to discuss the criteria listed in paragraph 6 separately with respect to the disputed inclusion of the dispatchers in the bargaining unit.

#### 8. NATURE OF WORK PERFORMED:

The dispatchers’ primary function is to receive calls from members and dispatch drivers or contractors to service the requests for assistance. Other duties include handing out and receiving keys from drivers, receiving cash receipts from drivers on occasion for forwarding upstairs and issuing supplies to drivers. Dispatchers also perform some “record-keeping” tasks associated with the receiving and dispatching of calls. That is, call slips are “batched” for forwarding upstairs so the appropriate data may be computerized. This is performed only during the day shift and is sometimes carried out in part by the supervisor. The dispatcher on the “c” shift does the “midnight books”, i.e., recording and averaging calls and mileage for drivers. Dispatchers also are responsible for letting persons in and out of the building in off-hours. The nature of work performed, taken as a whole, is similar neither to the work performed by the other members of the bargaining unit nor to that of the office and clerical staff. The Board considers this criterion to be neutral and, thus, it is not necessary to set out the duties of those other employees in detail.

#### 9. CONDITIONS OF EMPLOYMENT:

(i) The dispatchers work three shifts: 8:00 a.m. to 4:00 p.m. (“A” shift); 4:00 p.m. to 12:00 p.m. (“B” shift); 12:00 p.m. to 8:00 a.m. (“C” shift). The dispatchers, thus, are on duty 24 hours per day and seven days per week. Part-time dispatchers generally work weekends

except during peak periods when part-timers may work up to forty hours per week. Overtime is also a regular feature of dispatchers' employment during peak periods and even during the off-season to cover in case of illness, for example.

The drivers also work shifts on a seven day per week basis although the shift hours are somewhat different (6:30 a.m. — 2:30 p.m. and 2:30 p.m. to 1:30 p.m.) and there is no "C" shift. (Calls in that period are referred to outside operators). The day-care drivers have hours which, not unexpectedly, reflect the usual schedules of day-care operations. Overtime is also usual during peak periods for drivers.

This shift operation contrasts with the more regular hours of the office and clerical staff (i.e. 9:00 a.m. to 5:00 p.m. with extended hours on Thursday evenings to 8:00 p.m. and every other Saturday from 9:00 a.m. to 1:00 p.m.). Overtime is not a regular feature of this group.

(ii) This contrast is emphasized in the timing of breaks and scheduling of vacations. That is, drivers and dispatchers have no scheduled breaks in order to ensure coverage during the shift. Office staff, however, do have regularly scheduled lunch and coffee breaks. Moreover, the dispatchers and drivers (again, unlike the office staff) are restricted in scheduling their vacations to off-peak periods.

(iii) It was agreed that the drivers are paid hourly. Further, the dispatchers as well as other bargaining unit members punch a time clock while office staff apparently do not. (Part-time sales staff who solicit membership in the evening also punch a clock but the Board does not consider this as blurring the distinction between the dispatchers and drivers on one hand and the office and clerical staff on the other.)

(iv) There are no differences amongst classifications in the benefit accorded full-time employees.

This criterion, in the Board's view, favours the inclusion of the dispatchers in the unit.

## 10. SKILLS OF EMPLOYEES:

The skills of the dispatchers and other members of the bargaining unit are certainly different in that the mechanical skills of the drivers (although such skills are not likely of a high level) are not needed by the dispatchers. However, drivers on occasion have assisted dispatchers during peak periods, as have office staff on a very infrequent basis. It is also true that dispatchers have performed minimal clerical functions, such as stuffing envelopes, as a "filler" during slow times. The dispatchers, though, do not perform even these minimal clerical functions as a significant part of their responsibilities. The "midnight books" and batching, as well, are not time consuming responsibilities nor do they require specialized clerical skills. Also significant is the fact that there has been virtually no intermingling or transfer of employees between the dispatchers and office staff (or the drivers for that matter). Except as noted with respect to overtime assistance on occasion, the respondent hires dispatchers "off the street" rather than filling its needs from within its workforce. This criterion, then, is neutral, in the Board's view and does not assist the community of interest argument of either the respondent or applicant.

## 11. ADMINISTRATION:

This too is a "neutral" factor and is not dealt with extensively. The Board would only note that the dispatchers have their own supervisor, as do the drivers. In fact, the day-care drivers also have their own reporting line, i.e., to the manager of driver education. The witness did not disagree, when told by counsel for the applicant, that the dispatchers' supervisor reported through the drivers' supervisor to the general manager of the respondent.

## 12. GEOGRAPHIC CIRCUMSTANCES:

This criterion tends to reinforce the relationship between dispatchers and drivers. The dispatchers sit with a radio, microphone and maps at the counter in the south-west corner of the building downstairs. The dispatchers' supervisor, the drivers' supervisor, his secretary and the charge guard are also located in that area. Adjacent is the drivers' room where the drivers punch in and receive their keys. Also on the main floor are the touring staff, driver education staff, insurance agents and the cashier. Except for the driver education staff dropping off their keys in the evenings to the dispatchers, there is no contact between dispatchers and the other staff on the main floor. On the second floor are located the sales staff, accounting department, management offices, tourist guide book staff, record department and other secretarial staff. Occasionally, records is contacted by the dispatchers with respect to a recently renewed membership but otherwise there is no regular contact with the second floor employees. The Board considers that that geographic circumstances favour the finding of a community of interest between the dispatchers and the other employees in the bargaining unit.

## 13. FUNCTIONAL COHERENCE AND INTERDEPENDENCE:

(i) The Board regards the dispatchers and the drivers as intimately related in providing service to club members. The dispatchers receive the calls directly from the club members, dispatch drivers directly and those drivers provide the actual assistance. The dispatchers are in contact with the drivers via radio throughout the shift. There is additional contact with respect to handing out and returning of keys, collection of appropriate data, supplies distribution from the utility person to dispatchers to drivers, and cash receipts from drivers to dispatchers for some customer services. In contrast, there is little or no daily contact with employees in other departments. While, in a broad sense, it may be said that the entire operation is concerned with servicing members, the functional coherence of the dispatchers and drivers is distinct from a broader view of "service".

(ii) The Board does not consider the handling of cash, responsibility for building security on off-hours or the minimal clerical duties as detracting from the functional interdependence of dispatchers and drivers. The clerical functions, as stated, are low-skilled and either not a regular or time-consuming part of the dispatchers' responsibilities. The responsibility for "security" really amounts to letting people in and out after regular working hours. It was not asserted that the duties are those of "security guards" which, by virtue of section 12 of the Act, would require a separate bargaining unit. The handling of cash is simply receipt of cash from the drivers themselves in respect of certain services to customers.

(iii) The respondent submitted that, as the dispatcher decides which driver will handle which call or whether an outside contractor is to be called, there was a potential conflict between dispatchers and drivers and, accordingly, both classifications should not be in the same bargaining unit. On the evidence, the Board finds that the dispatchers do "direct" the drivers in one sense, but that the decision is actually determined by clear guidelines. That is, the driver closest to the call is dispatched. If that driver is busy, a driver from another area who is not



on a call but is relatively close is dispatched. If all drivers are busy, an outside contractor is called. The Board is satisfied that the dispatchers do not “direct” the drivers in a way which raises a conflict of interest. The relationship of dispatcher and driver is likely less authoritative than that of lead hands and line employees, and lead hands are almost invariably included in the unit. Moreover, there was no assertion by the respondent that the dispatchers should be excluded from the unit as “managerial” persons in accordance with section 1(3)(b) of the Act. The Board would also note that the relationship of dispatcher and driver is very different from that of dispatcher and driver in the taxi-cab or trucking industries where the dispatchers usually have a direct impact upon the earnings of the drivers. Here, the drivers are on duty for their shift; if there are no calls, the drivers are still paid hourly but “sit” in their cars or occasionally in a restaurant or at home if these locations are within the area and provided the dispatcher is notified as to where the driver can be reached by telephone. Since the choice of driver to be dispatched is so clearly governed by the company guidelines, the dispatcher does not have the discretion to “play favourites” amongst the drivers nor to incur undue costs by hiring outside contractors. It should also be stressed that there was no evidence of actual conflicts of interest between dispatchers and drivers. In the absence of such evidence, the Board should be cautious in placing considerable reliance solely on an asserted potential for conflict in resolving community of interest issues. In any event, in this case, the Board finds no basis for the conflict of interest as submitted by the respondent.

(iv) Thus, on balance, the Board considers the duties of dispatchers and drivers to exhibit a considerable functional coherence and interdependence. This criterion certainly supports the inclusion of the dispatchers in the bargaining unit.

14. Of the six criteria, three (skills of employees, administration and nature of work performed) may be considered neutral on the question of community of interest between the dispatchers and the other employees in the bargaining unit. The three other criteria (conditions of employment, geographic circumstances and functional coherence and interdependence) strongly favour the inclusion of the dispatchers in the bargaining unit. No single factor is pre-eminent and all criteria are to be considered (see: *Adams Furniture Co. Ltd.*, [1975] OLRB Rep. June 491; *Extendicare Diagnostic Services*, [1982] OLRB Rep. Aug. 1168). In the circumstances of this case, however, the Board finds that consideration of the criteria must lead to a conclusion that the dispatchers should be included in the bargaining unit as sharing a community of interest with those employees.

15. The Board does not regard the decision in *Hamilton Automobile Club*, *supra*, as of assistance in resolving the issue before this Board. That is, the Board in *Hamilton Automobile Club* rejected a unit composed solely of dispatchers as not appropriate. That Board was concerned with the balkanization of bargaining if such a dispatcher-only unit was considered appropriate. This basis for the decision is clear in the underlined passage from paragraph 8:

8. If the Board were to assume, without finding, that dispatchers do not exercise managerial function [sic], the Board is satisfied on the undisputed facts asserted by the respondent that dispatchers share a greater community of interest with office and sales staff than with tow truck operators. Furthermore, there are already two bargaining units: tow truck operators and in-car driver instructors. If the dispatchers were to be carved out of the remaining unrepresented employees, it would mean that there would be a minimum of four full-time bargaining units possible. The respondent employs also a significant number of part-time [sic] employees, so there is a potential for additional bargaining units of part-times employees which would be the mirror image of the full-time units. *This opportunity for fragmentation of the respondent's Hamilton employees into multiple bargaining units would not be conducive to sound collective bargaining.*

[emphasis added]

The Board need not deal with the first sentence in that paragraph except to note that the issue before this Board is different, i.e., whether the dispatchers share a community of interest with the otherwise agreed bargaining unit, a unit significantly broader than the tow-truck operators unit in *Hamilton Automobile Club*. Further, the Board's aversion to fragmentation of the unit would not lead to the exclusion of the dispatchers in this case. Rather, since the Board is of the view that there is no community of interest between the dispatchers and the office and clerical staff, the concern with respect to avoiding fragmentation would favour the inclusion of the dispatchers with the otherwise agreed on bargaining unit. In any event, the Board has expressly found the dispatchers do share a community of interest with the others in the bargaining unit.

16. Thus, for the reasons given, the Board finds that the dispatchers do share a community of interest with other employees in the bargaining unit and, as set out in paragraph 4 of the December 21, 1984 decision, finds that all employees of the Essex County Automobile Club in Windsor, Ontario, save and except supervisors, those above the rank of supervisor, driver instructors, sales staff, office and clerical staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. This matter is hereby referred to the Registrar.

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## 2154-83-OH Murray Strong, Complainant, v. General Motors of Canada Limited and Ron Broad, Respondents

**Health and Safety — Practice and Procedure — Witness — Party to safety complaint serving summons on inspector — Whether compellable witness — Whether matters relating to which testimony sought within provision making inspector not compellable**

**BEFORE:** Robert D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *Howard S. Swartz for the complainant; E. T. McDermott for the respondents; H. P. Rolph for Fred Iacovoni and the Ministry of Labour.*

**DECISION OF THE BOARD;** February 6, 1985

1. On January 31, 1985, during the thirteenth day of hearing of this complaint under section 24 of the *Occupational Health and Safety Act* (the "Act"), the Board heard submissions concerning the compellability of Fred Iacovoni, an inspector under the Act, to testify in these proceedings in respect of certain matters. After hearing the submissions of counsel for the complainant, counsel for the respondent, and counsel for Mr. Iacovoni and the Ministry of Labour (the "Ministry"), the Board reserved its ruling on that matter, and advised the parties that it would issue a written ruling prior to the continuation of hearing scheduled for February 14, 1985.

2. The matters about which counsel for the complainant seeks to compel Mr. Iacovoni to testify are:

- (1) the dates and times of certain meetings that Mr. Iacovoni attended on the respondent's premises, and the people who were present during this investigation;
- (2) the details of Mr. Iacovoni's contact with the complainant after Mr. Iacovoni had decided that the work in question was safe and had given his oral report to that effect;
- (3) Mr. Iacovoni's recollection of whether or not the complainant was invited to be present at the tests conducted by the Ministry and, if so, what the complainant's response was to that request; and
- (4) how Mr. Iacovoni's and Mr. Toth's investigation was initiated, i.e., how they were "called in".

3. On March 5, 1984, during the first day of hearing in this matter, counsel made submissions to the Board concerning the compellability of Mr. Iacovoni, who had been served with a summons at the instance of the complainant. After hearing the submissions of counsel and recessing to consider them, the Board made the following unanimous oral ruling (reported in [1984] OLRB Rep. March 459):

Mr. Swartz, as counsel for the complainant, seeks to compel Fred Iacovoni to testify in respect of this complaint under section 24 of the *Occupational Health and Safety Act*. Mr. Iacovoni is an "inspector" appointed for the purposes of the Act, within the meaning of part 14 of section 1 of the Act. Ms. Dietrich, as counsel for Mr. Iacovoni, submits that Mr. Iacovoni cannot be compelled to testify in respect of this complaint by virtue of section 34(2) of the Act, which provides:

An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector is not a compellable witness in a civil suit or any proceeding, except an inquest under the *Coroners Act*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

In support of her position, Ms. Dietrich submits that this hearing is a "proceeding" within the meaning of section 34(2). Counsel for the complainant does not dispute that this is a proceeding, but suggests that the evidence which he seeks to adduce through Mr. Iacovoni is not "respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations". The complainant seeks to compel Mr. Iacovoni to testify concerning the time at which he issued his report and concerning certain statements allegedly made by supervisory personnel to Mr. Iacovoni after he had completed his tests, which statements will allegedly disclose their bias against the complainant, and the true motivation for his discharge. Counsel for the respondents supports Ms. Dietrich's position, and suggests that any attempt to limit his cross-examination of Mr. Iacovoni in the manner implicit in Mr. Swartz's submission might constitute a denial of natural justice.

Having considered the submissions of the parties, it is our ruling that Mr. Iacovoni is not a compellable witness in respect of any of the matters identified by Mr. Swartz in his able submissions. We agree with Ms. Dietrich's submission that the hearing of this complaint is a "proceeding" within the meaning of section 34(2) of the Act. The broad scope of the



phrase "civil suit or any proceeding" is apparent not only from the use of the word "any", but also from the express exclusion of an inquest under the *Coroners Act*. If the words "any proceeding" did not include administrative hearings, then that exclusion would be unnecessary. (See, generally, *Re Dorothea Knitting Mills Ltd.* (1975), 9 O.R. (2d) 378, and *Re Harry Woods Transport Ltd.* (1980), 25 L.A.C. (2d) 60.) Moreover, we are satisfied that the evidence which the complainant seeks to compel Mr. Iacovoni to give is evidence respecting information, material, statements or tests acquired, furnished, obtained, made or received under the Act or regulations. The alleged statements by supervisory personnel clearly fall within the ambit of statements received under the Act. The issuance of the report was one of the official functions which Mr. Iacovoni was performing on the premises and was itself information furnished by Mr. Iacovoni under the Act. Finally, we would note that there are sound policy reasons for upholding Ms. Dietrich's objection. If an inspector is to be able to properly perform his important functions under the Act, he must be able to freely obtain information from persons in the workplace and carry out his other tasks in a context in which neither he nor the persons with whom he speaks will feel constrained by the possibility that he may subsequently be compelled to testify at the instance of one of the parties to proceedings such as a complaint under section 24 of the Act. Thus, we are satisfied that the objects of the Act are best served by the aforementioned construction of section 34(2), which we feel to be of the type permitted and encouraged by section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Accordingly, we rule that Mr. Iacovoni cannot be compelled to testify in respect of any of the aforementioned matters, and he is hereby released from the summons served upon him by the complainant.

4. Counsel for the complainant contends that the four matters concerning which he now seeks to question Mr. Iacovoni are not covered by our prior ruling and do not fall within the scope of section 34(2). Counsel for the respondent submits that the complainant is precluded from calling Mr. Iacovoni to testify concerning any of those matters by the Board's ruling of March 5, 1984, and by the provisions of section 34(2). It is also the position of Mr. Rolph, as counsel for Mr. Iacovoni and the Ministry, that all of those matters fall within the purview of section 34(2). Thus, he asks the Board to rule that they are not matters on which Mr. Iacovoni can legally be compelled to testify in these proceedings.

5. Having carefully considered the able submissions of counsel, we are of the view that Mr. Iacovoni is not a compellable witness in respect of any of the four matters set forth above. All of the information which Mr. Iacovoni may have concerning the dates and times of the meetings in question, and the people present during the investigation, is information acquired under the Act or regulations, as he would not have been involved in any of those meetings or even have been in a position to acquire information of that sort but for the fact that he was on company premises performing one or more of his various functions under the Act. Similarly, evidence concerning the details of any of Mr. Iacovoni's contacts with Mr. Strong on the company's premises in relation to the subject matter of these proceedings falls squarely within the scope of any information, material, or statement acquired, furnished, obtained, made or received under the Act or regulations. The fact that one or more of Mr. Iacovoni's contacts with the complainant on the company's premises may have occurred after Mr. Iacovoni had decided that the work was safe and had given his oral report to that effect does not change the fact that Mr. Iacovoni's continuing contact with the complainant resulted from Mr.

Iacovoni's attendance at the workplace in respect of what was, or was said to be, a continuing refusal by the complainant to perform certain work under the Act. We are also of the view that any evidence which Mr. Iacovoni might be in a position to give concerning whether or not the complainant was invited to be present at the tests conducted by the Ministry and, if so, what the complainant's response was to such request, would unquestionably be evidence "respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the Regulations" within the meaning of section 34(2) of the Act. The same is true of any evidence which Mr. Iacovoni might be in a position to give concerning how he and Mr. Toth came to be called in to perform their investigation under the Act.

6. As noted in our earlier ruling, if an inspector is to be able to perform his important functions under the Act, he must be able to freely obtain information from persons in the workplace and carry out his other tasks in a context in which neither he nor the persons with whom he speaks or interacts will feel constrained by the possibility that he may subsequently be compelled to testify at the instance of one of the parties to proceedings such as a complaint under section 24 of the Act. Moreover, as submitted by Mr. Rolph, the protection provided by section 34(2) of the Act ensures that the inspector's position as a neutral investigator and decision-maker will not be tarnished by the appearance of partisanship which could result if he were required to testify at the behest of an employee, an employer, or a union, in a civil suit or administrative proceeding, such as the present complaint, respecting any information, material, statement or test acquired, furnished, obtained, made or received under the Act or the regulations. Thus, we are of the view that the interpretation that we have placed on section 34(2) in our previous ruling and in the present ruling is the type of "fair, large and liberal construction or interpretation" mandated by section 10 of the *Interpretation Act* and best suited to attaining the object of the Act according to its true intent, meaning, and spirit.

7. The hearing of this matter will continue on February 14, 25, and 28, 1985, as previously scheduled.

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**1956-83-R The Canadian Union of Public Employees, Applicant, v. The Hospital for Sick Children, Respondent, v. Group of Employees, Objectors**

**Bargaining Unit — Practice and Procedure — Union seeking bargaining rights for hospital service unit — Whether technical categories having community of interest within service unit — Whether more appropriately belonging in paramedical or office units**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

**APPEARANCES:** *Jeffrey Sack, Q.C., Cathy Lace, Helen O'Regan, Romeo Best, John Vanelli and J. Anderson for the applicant; F. G. Hamilton, Q.C., J. E. Stibbards, Graydon McNair and Valerie Cassells for the respondent; Barry Edson, Fran Macaluso, Marilyn Becker and Robin A. Barclay for the objectors.*

**DECISION OF THE BOARD;** February 21, 1985

I

INTRODUCTION

1. This is an application for certification. The initial problem which it raises involves the determination of the unit of the respondent's employees appropriate for collective bargaining. In order to put that issue into perspective, it is necessary to sketch in a little of the background, the purpose of the bargaining unit determination, and some of the concerns which the Board has expressed when exercising its authority under section 6 of the Act, to prescribe the shape and composition of the bargaining unit. It will also be necessary to advert, briefly, to the unique legal and employment environment of the hospital sector. For ease of reference, the applicant will be referred to as "CUPE" or "the union," and the respondent will be referred to as "the Hospital". It is not disputed, and the Board finds that CUPE is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

II

Background: the dimensions of the bargaining unit problem

2. On November 22, 1983, CUPE filed an application for certification, seeking to represent a bargaining unit of Hospital "service workers". "Service units" of this kind are common in Ontario hospitals, — although the grouping of employees included in a service unit may not always be precisely the same. In fact, the term "service unit", although a useful shorthand, is something of a misnomer. The core of the service unit does indeed encompass employees performing what might be described as the Hospital's "hotel functions": cleaning, housekeeping, laundry, maintenance of the physical plant, etc. However, the so-called "service unit" also includes employees such as orderlies, nurses' aides, and RNA's who have direct patient contact or are involved in direct patient care. It will be seen therefore, that the "service unit" can include quite a diverse grouping of employees, ranging from those who are totally unskilled, to those who are highly skilled (such as maintenance electricians) and are paid accordingly. Since these workers were among the first in the hospital sector to organize, there



have been established bargaining relationships and collective agreements since the 1960's or early 1970's.

3. Typically, these service units exclude what might be described as professional, paramedical or technical personnel — although, again, the details may vary from hospital to hospital, depending upon the precise paramedical or technical groups employed from time to time. The paramedical employees are either not represented by a trade union at all, or have their own separate bargaining unit. Likewise, the hospitals' office and clerical staff are either unrepresented or are grouped in their own separate bargaining unit. CUPE represents service units at Toronto General Hospital, Toronto Western Hospital, North York General Hospital and many others. CUPE represents clerical bargaining units at St. Joseph's Hospital (Guelph), Leamington District Memorial Hospital, Oshawa General Hospital, Glengarry Memorial Hospital (where clericals are included with some "technical"), Cornwall General Hospital, Windsor Western Hospital, Stratford General Hospital, North Bay Civic Hospital and Kingston General Hospital. In a recent case involving St. Joseph's Hospital, [1983] OLRB Rep. June 984, the Board had occasion to set out the description of a typical "service unit":

*All employees of [Name of Hospital] save and except professional medical staff, graduate nursing staff, under graduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-, occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists-medical illustrators, registered, non-registered and student; laboratory technicians, X-ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians and laboratory assistants) supervisors, persons above the rank of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.*

[emphasis added]

4. In the instant case, CUPE has organized and seeks to represent a bargaining unit which it initially estimated contained about 600 employees. The Hospital initially claimed that the appropriate bargaining unit is much broader, including a little over a thousand employees. Some of this divergence arises because of the union's imperfect knowledge of the precise number and status of the employees on the Hospital's payroll; however, most of it results from radically different views as to how the bargaining unit should be described and what, indeed, is "appropriate".

5. In its initial application the union made it clear that it did not seek to represent the technicians or technologists employed in the Hospital's medical departments or laboratories (X-ray, radiology, etc.). The union's position was and remains that these technical and paramedical personnel do not share a community of interest with service workers and should not be put in the same bargaining unit as service workers. The union seeks a bargaining unit which, in general terms, is framed in the same way as *St. Joseph's Hospital, supra*, and which the union says is appropriate whatever broader grouping might also be appropriate. The union also points out that in dozens of hospitals across the province, technical personnel have routinely been excluded from the "service unit". It is acknowledged, however, that many of these

bargaining units have been based upon the agreement of the parties in particular cases, so that the precise perimeter of the service unit is not always clear and consistent.

6. The Hospital's position is that there is no rigid distinction between service, paramedical and technical personnel. The Hospital argued that there are large numbers of persons with a "technical" job title who should really be included in the service bargaining unit that the union seeks to represent, because the "job distance" between these employees and service workers (based upon training, level of sophistication, duties, degree of independent discretion, reporting structures, etc.) does not warrant excluding them from the service unit. The Hospital notes that a typical service unit contains not only R.N.A.'s but also skilled tradesmen such as electricians who acquire provincial certification after a prescribed program of training and apprenticeship. It could easily encompass a variety of "technical" employees. The Hospital's position is that it does not matter that many of the so-called "technical" employees may not *want* to be included in a "service bargaining unit". They have an objective community of interest with employees in the service unit and should, therefore, be grouped together with them. Initially, the Hospital even claimed that trained child care workers with a Master's degree in social work could comfortably fit within the traditional "service" unit without any serious collective bargaining problems.

7. These submissions of the parties were entertained, at hearings before the Board on December 9th, 12th and April 16th. In addition, the parties met on a number of occasions to investigate and clarify the number and functions of the disputed employees, and explore the possibility of narrowing the matters in dispute. On February 14, 1984, the Board issued a four-page decision setting out the dimensions of the bargaining unit problem and the positions taken by the various parties. The Board then directed that this decision be posted along with the notice of the next hearing, so that the employees would know what was going on. There was obviously some concern among a number of paramedical or technical employees whom the union did not seek to represent, and who, it seems, did not wish to be represented, but who the Hospital said should nevertheless be included in any proposed bargaining unit. A number of those employees were not entirely sanguine about this position taken by their employer, and addressed written submissions to the Board or actually appeared to make representations.

8. As a result of the initial series of hearings, some progress was made in simplifying the issues. For example, by letter dated March 8, 1984, the Hospital advised that it was no longer claiming the inclusion in the bargaining unit of the following classifications: dental hygienist, dental technician, psychometrist, audiologist, speech pathologist, interpreter, research assistant, non-registered technician/research, assistant technician/research, pathology assistant, research technicians I, II and III, social workers (M.S.W.), child care workers, and recreationists. The hospital had earlier asserted that all of these classifications should be included in the bargaining unit even though the union had expressed no desire to represent any of these employees, and they had themselves no obvious appetite for collective bargaining. The "recreationists" had retained counsel and appeared before the Board to resist their employer's assertion that they should be included in that bargaining unit. The hospital's reconsideration of its position made their objection academic.

9. But there were still a large number of classifications and employees in dispute. The Hospital asserted that when the Board examined the actual work situation of these nominally "technical" employees (to adopt the Hospital's own description of their jobs), it would be apparent to the Board that they should appropriately be included in the unit of "service" workers which the union sought to represent. CUPE expressed grave concern about what it characterized

as the Hospital's effort to "flood the list" with hundreds of employees outside the group, who, it was said, constituted the typical service unit which the union sought to represent. CUPE argued that the "add on" group did not share a community of interest with its proposed service unit. More fundamentally, CUPE argued that the unit which it sought to represent was appropriate in itself, even if there was some other more comprehensive unit including the add-on group, or part of it, which would also be appropriate. The union submitted that if the Board embarked on an enquiry concerning the circumstances of dozens of classifications and hundreds of employees, the litigation would be endless and the cost and delay would seriously undermine the rights of its members.

10. By decision dated May 1, 1984, the Board determined that it should begin with an examination of the functions of the most heavily populated classifications. Hearings for this purpose were conducted before a Board Officer on May 22nd, 23rd, 29th, 30th, and June 5th, 6th, 12th, 13th and 26th. The evidence was transcribed, the exhibits were compiled, and the Officer's report was issued to the parties on August 7, 1984. In response, counsel for the parties made written submissions and requested a further hearing before the Board. That hearing was conducted on September 7, 1984, and continued on September 21, 1984.

11. The evidence and representations were addressed in respect of the following classifications: ward clerks, nursing technicians, pharmacy assistants/technicians, assistant technicians, jr., animal care attendants and technicians I and II, and orthotic technician. We shall have more to say about these classifications below. First, it is necessary to review the Board's general approach in making bargaining unit determinations.

### III

#### Determining the Appropriate Bargaining Unit — In General

12. Prior to the passage of collective bargaining legislation in the early 1940's, there was no prescribed mechanism for the acquisition of bargaining rights. If a group of employees sought to form or join a trade union, and if they had sufficient bargaining power, they were able to compel their employer to meet and bargain. However, the only means of achieving recognition was to threaten a strike. A union had no statutory right to bargain on behalf of its members, and no statutory obligation to represent anyone else. Even if a bargain was struck, the agreement was not, in itself, a binding and enforceable contract. Its enforceability depended upon the parties' economic strength.

13. In 1943, borrowing from American experience, the Legislature passed the *Ontario Collective Bargaining Act* (S.O. 1943, c.4). The new legislation provided a process whereby a trade union could become the exclusive bargaining agent for the employees in a "unit of employees. . . appropriate for the purposes of collective bargaining" which could be an "employer unit, craft unit, plant unit, or a subdivision thereof" (see section 13(5a)). Over the years, that language has not changed very much. Section 1 and 6 of the present *Labour Relations Act* read (in part) as follows:

6. -(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.



1. -(1) In this Act,

• • •

(b) “bargaining unit” means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: “white collar” office and technical employees, and “blue collar” production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional “blue collar” industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal “inside workers” (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board’s decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel — and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost “class”) divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is “inappropriate” to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

15. Now obviously, the determination of the appropriate bargaining unit has immense practical and tactical significance. The unit determines the constituency within which the union must establish majority support if there is to be any collective bargaining at all. To put it another way, the unit determines the group of employees whose support must be solicited by their fellows if the objective of collective bargaining is to be achieved. A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what *this Board* determines is an appropriate unit, and that may not be so easy to predict — as the present case indicates. Moreover, to the extent that the contours of the bargaining unit are unclear, there will be uncertainty about precisely how employees should go about organizing themselves in order to conform with what the law may require. There will also be the prospect of litigation, cost, and delay which may prejudice both the applicant union and the employees it seeks to represent (see the remarks of Laskin, J.A. in *Nick Masney Hotels Limited*, (1970) 13 D.L.R. (3d) 289; 70 CLLC ¶14,010; and those of Estey J.A. (as he then

was) in *Re Journal Publishing Co. of Ottawa et al.*, and *Ottawa Newspaper Guild et al.* [1977] 1 ACWS 817). Cost and delay will also be of concern to the employer, and to employees whose wages may be temporarily “frozen” by section 79 of the Act even if they are ultimately excluded from the bargaining unit. The situation is exacerbated in the instant case where the bargaining unit is large, and both parties have experienced some difficulty determining the precise perimeter of the unit, and how (if at all) it can be meaningfully and consistently distinguished from the lower levels of employees working nominally (in the employer’s terms) in “technical” job classifications.

16. Ideally, the determination of the bargaining unit should involve an informed exercise of the Board’s judgement, based upon objective criteria, industrial relations experience, and a sensitivity to the statutory objects. Ideally, it should be a dispassionate enquiry focusing on what is sensible, workable and, in short, “appropriate”. However, the Board cannot ignore the fact that in an adversarial model, unions and employers may both be tempted to frame their submissions with an eye to advancing, delaying or avoiding the objective of collective bargaining. That was an undercurrent in both parties’ arguments from time to time. A union may seek to tailor its proposed unit in terms of its established supporters. An employer may seek to exclude pockets of likely union supporters, or argue for the inclusion of those whom the union may not have organized, or who are unlikely to have been receptive. An employer may even be tempted to raise bargaining unit issues as a means of delaying the certification application and interrupting the momentum of the union’s organizing drive — particularly if there is to be a representation vote. A graphic example of these pragmatic/tactical considerations can be found in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293, where the union initially sought a unit covering only the larger of two plants which an employer operated in a municipality. The employer asserted that the bargaining unit should cover both plants. Following a representation vote, it became known that the ballots cast in the larger plant gave the union a sufficiently wide margin that it could obtain bargaining rights for *both* plants, regardless of how the smaller plant had voted. The parties promptly reversed their positions. Such purely tactical considerations merely complicate the Board’s task in particular cases.

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the “appropriate bargaining unit”? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board’s control, the discretion to frame the “appropriate” bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer’s business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit — particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer’s administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted,

a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

18. Some of the collective bargaining consequences of the bargaining unit determination were canvassed in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481. In that case, the applicant was seeking to represent a "craft" unit of about 100 certified electricians who were part of a maintenance department of 800 employees and an industrial work force of 2,800, all of whom were unorganized. The Board made the following general observations about the potential significance of a bargaining unit determination:

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.



A patchwork quilt of bargaining units is a recipe for industrial unrest — if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

The comments in *Kidd Creek* illustrate some of the problems which could arguably arise in some settings from an unduly fragmented bargaining structure — even if the group of employees who sought to organize themselves did indeed share a distinct or identifiable community of interest.

19. Some of the same concerns underly the Board's analysis in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which involved an attempt by two unions to organize differently described but overlapping units of paramedical employees. The initial problem was the description of the appropriate bargaining unit. The Board recognized that in the special environment of a public hospital pharmacists, physiotherapists, social workers, etc. all had an arguably distinct identity stemming from such factors as their specialized training, outside professional or quasi-professional associations, and particular departmental focus. In this sense, each sub-group and each department could claim a distinct community of interest. However, the Board made it clear that this did not mean that each of these groupings, would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of bargaining would create serious administrative problems for the Hospital. Nor, for reasons set out at length, was the Board persuaded that technical, paramedical, paraprofessional and professional employees could, or should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between the various sub-groupings based upon their level of education, responsibilities, degree of independence, and how far they had travelled on the "road to professionalization". The Board was of the view that for collective bargaining purposes, they could all comfortably co-exist within one paramedical bargaining unit.

20. In *Kidd Creek* (and *Stratford General Hospital*, to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted. On the other hand, if the potential for collective bargaining difficulties is less obvious or serious, or if the possible problems are less certainly connected with one bargaining unit definition as opposed to another, or if similar problems are likely to arise wherever the line is drawn, then the precise perimeter of the bargaining unit may be less important from a policy point of view.

21. None of this is new of course. The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi — plant unit. Full time and part time employees can be segregated, but there are many situations where they have not been. This reality was discussed in the *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, in a long

passage to which we might usefully refer, and which also contains a review of the mechanics of the certification process:

14. The Board has a wide discretion pursuant to section 6(1) of the Labour Relations Act in determining what is appropriate in the facts of each case. Also section 1(1)(A) [now section 1(1)(b)] provides:

“bargaining unit” means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them;“.

Section 6(1) requires that an appropriate bargaining unit shall consist of more than one employee. In addition section [6(3)] which is concerned with craft units requires that in certain circumstances a group of employees shall be deemed to be appropriate and further section [119(1)] makes special provisions for determining an appropriate bargaining unit in construction industry situations.

15. It is apparent that section [1(1)(b)] contemplates that an individual employer may employ persons who can be subdivided into more than one appropriate bargaining unit. It has therefore been common for a single employer to be certified for a number of appropriate bargaining units, e.g. office unit, craft unit, plant unit, sales unit, part-time unit. We emphasize the capacity for more than one appropriate bargaining unit to exist with respect to a single employer, a capacity which is statutorily confirmed by section [1(1)(b)], because from time to time persons have argued before this Board that the use of the definite article in section 6(1). i.e.

“The Board shall determine *the* unit of employees that is appropriate for collective bargaining“,

means that there is only one appropriate bargaining unit in each case.

16. It is also helpful to review the process of determining the appropriate bargaining unit. In each particular application the applicant trade union is required to provide a “detailed description of employees of the respondent that the applicant claims to be appropriate for collective bargaining”. . . . The respondent employer is by way of reply, entitled to provide a detailed description of the unit claimed by the respondent to be appropriate for collective bargaining. . . . A respondent employer is further directed. . . . “If, in your reply, you propose a bargaining unit different from the one proposed by the applicant, you shall indicate on the list of employees referred to in paragraph 7 the name and classification of any person you propose should be excluded from, as well as the name and classification of any person you propose should be added to, the bargaining unit proposed by the applicant”. Accordingly, in any single application, the applicant trade union and respondent employer may make submissions that agree or disagree on all or some of the various factors concerning the appropriate bargaining unit. Where the parties disagree it is the function of the Board to decide which, if any, or part of the contending positions is proper. For example the Board in an individual application may exclude certain persons as being managerial while including others; again groups of employees may be included or excluded from bargaining units depending upon whether they share a community of interest with other employees. See e.g. *Wakefield Lighting Limited* 1965 May OLRB Mthly. Rep. 143 (plant clerical staff); *Sherman Mine, Cliffs of Canada, Limited* July 3, 1969 Board File No. 15604-68-R (laboratory employees); *Affiliated Medical Products Limited* January 9, 1969 (quality control laboratory technicians). In other situations the Board may be required to exclude persons because of a statutory prohibition. See e.g. *The Corporation of the City of Cornwall* June 3, 1969 Board File No. 16166-69-R (police employees). The Board’s process is a fact finding one resulting in inclusions, exclusions, accretions and deletions to the proposed bargaining units.

17. After sifting the various facts the Board must determine “the unit of employees” that is appropriate having regard to the particular situation then before the Board. The only fetters on the Board’s discretion to make a determination are the requirements contained in section 6(1) that the “unit shall consist of more than one employee”, *Alberi Fuel*

*Limited*, 1969 October 3, Board File No. 16685-69-R, and that the unit of employees is appropriate for collective bargaining — there are no other requirements. The unit that is appropriate is the unit that emerges after all the facts have been considered.

18. The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, 1969 January OLRB Mthly. Rep. 1016.

19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the Labour Relations Act. The National Labour Relations Board in the United States has recognized in certain cases that its determination of appropriate bargaining units has "operated to impede the exercise by employees... of their rights of self-organization...". *Save-on-Drugs Inc.* 138 NLRB 1032 (1961); see also *Quaker City Life Ins. Co.*, 134 NLRB 960 (1961). While great weight must be given to prior cases dealing with similar situations, those cases are not dispositive of the issue in any given case. Bargaining unit determination requires a case by case review of the facts and this is compelled by the working of section 6(1) which provides that the Board "Upon an application... shall determine the unit of employees that is appropriate for collective bargaining...".

20. It is readily apparent why plant units, or office and sales units are appropriate as a subdivision of an employee unit. There are however, cases where the lines of demarcation are not so readily apparent and that is particularly so in areas apart from private industry. For example, in the *Canadian Union of Public Employees v The Governors of the University of Toronto* February 1969 OLRB Mthly. Rep. 1149; June 1969 OLRB Mthly. Rep. 334, the applicant proposed a bargaining unit for all non-professional employees of the respondent in those libraries that fall within the jurisdiction of the University of Toronto Library while the respondent submitted that the appropriate bargaining unit was one encompassing all non-academic employees of the University of Toronto. The Board concluded that the non-academic or non-professional employees of the University Library was an appropriate bargaining unit. In that case a bargaining unit composed of all non-academic employees would also have been appropriate, and perhaps more appropriate as a subdivision of an employer unit. In arriving at its determination the Board was simply fact finding for the purpose of determining and describing an appropriate unit and as such considered the employer's organization and the extent of organization of employees with other factors. It was not choosing between or among appropriate units or more or most appropriate units. Its fact finding was governed simply by what in all the circumstances was appropriate. That is a process that is carried on in many of the situations confronting this Board in making bargaining unit determinations.

21. The Board's process therefore in determining appropriate bargaining units is not directed to certifying the more or the most appropriate bargaining unit — The Labour Relations Act only requires that the unit of employees be appropriate; the Act does not require labour organizations to seek representations in the most comprehensive or optimum groupings unless such grouping constitutes the only appropriate unit. Cf. *Federal Electric Corp.* 157 NLRB 89 (1966); *Bagdad Copper Company* 144 NLRB 1496 (1963).

22. In conclusion we hold that where section 6(1) refers to "the unit of employees that is appropriate" it does not impose any requirement that the Board choose the more or most



comprehensive unit — it only requires the Board to determine the unit of employees that is appropriate for collective bargaining having particular regard to the facts of the immediate application.

Similar views were expressed some years later in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

12. The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.

The objective is a viable collective bargaining structure.

22. There are two other cases which are worthy of brief mention: *Canada Trusco Mortgage Company*, [1977] OLRB Rep. June 330, and *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. In each case, the union sought to represent a bargaining unit of employees

working in a particular branch or location of the employer's operation, and the employer argued that the appropriate bargaining unit should encompass a much larger group. Neither case involved hospital employees; but, for our purposes, they are significant because they reiterate that in given circumstances there may be more than one appropriate unit. In *Canada Trusco*, for example, the Board noted that:

It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employment interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large. The question is whether a separate community of interest, based on day to day dealing with their vital job interests, is found among employees at the branch at Simcoe.

The Board went on to find that the single branch was indeed *an* appropriate bargaining unit and, therefore, the union's application could proceed, even though a larger grouping might also be appropriate. Similarly, in *K Mart*, the Board held that a single store unit would be appropriate even though a unit consisting of all stores in Metropolitan Toronto would also be appropriate. In both cases the Board observed that the Board's process of bargaining unit determination should not be administered so as to unduly impede employee access to collective bargaining. A trade union should not be denied the opportunity to represent an appropriate subdivision of employees, even though some other subdivision, broader or narrower, might also be appropriate.

23. We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. In this case, for example, the process of bargaining unit determination has already taken up more than a year and, fifteen days of hearing, with the prospect of many more. (*Kidd Creek* is still pending before the Board after eighteen months and about a dozen hearing days.) That delay may be seriously prejudicial to the applicant union, even if its position is ultimately accepted, and, in the instant case, it will undoubtedly be of concern to the large number of employees who support the union but whose rights remain in limbo until this Board determines the group of their fellow employees with whom, by law, they must bargain. It is also a matter of concern to that group of employees whom the union does *not* seek to represent, and who may not wish to be represented, but who the Hospital says must be included in the unit. They may well have some difficulty understanding why they should be swept into the ambit of collective bargaining against their wishes and despite the union's express position that it does not seek to represent them. Having regard to the purpose of section 6(1) one might well ask whether the resolution of the issues in dispute here really justifies the cost and potential prejudice. To put the matter more concretely: are the distinctions which the parties urge upon us significant from a labour relations perspective; or are they like the distinctions among paramedical employees considered by the Board in *Stratford General Hospital* — real, and to them important, but not determinative when it comes to drawing a workable bargaining unit.

24. This is not to say that the Board should administer the Act on the basis of its own or the parties' administrative convenience (although those are legitimate concerns), nor in any

particular case should the Board blindly accede to one party's position, simply because to fully canvass that of the other party may require time-consuming and costly hearings. Litigation is the price one must pay for regulatory complexity, and there will undoubtedly be cases in which the result will turn on subtle shadings of fact, which can only be drawn after protracted hearings. We are not at all certain that this is one of them.

#### IV

#### THE HOSPITAL SETTING

25. Collective bargaining in public hospitals is a relatively recent phenomenon. Its growth paralleled an expansion of the health care system, remarkable advances in medical technology, and the introduction of sophisticated, multi-disciplinary treatment and rehabilitation techniques. In this sense, hospitals have been at the forefront of the "high tech" revolution. There really is no obvious private sector counterpart.

26. Significant numbers of hospital employees have post-secondary, technical or professional training, based upon a defined and specialized body of scientific knowledge. Even those performing more mundane functions will be associated in their work with a variety of professional or paramedical personnel. The mix of employees is quite unique, and in this context, each professional grouping, subspecialty or department might have some claim to a distinct community of interest and their own bargaining unit. At the other extreme, one might plausibly argue that all hospital employees are, in one way or another, part of the "health care team" who could conceivably be grouped within a single bargaining unit (although, of course, their particular ranking in the job hierarchy might attract different compensation levels). There are many bargaining units which quite successfully encompass quite diverse employee groupings, and one can point to the consolidated civil service unit which embraces psychiatric hospitals.

27. Regardless of how one draws the bargaining unit in a hospital setting, one would not expect very much interchange of employees from one specialized department to another. Within each area or department there will likely be layers of specialization and a hierarchy of proficiency judged, in large measure, with reference to standards or training programmes established outside the hospital itself. Promotion or progression up the job ladder may depend more on the acquisition of additional training than, for example, years of service. In a hospital setting, many "standard" collective agreement provisions respecting seniority, job posting, "bumping rights", etc. may have a different (probably lesser) significance than they have in an industrial plant.

28. For large sophisticated employers in an unorganized setting, employee wages and benefits are likely to be determined in accordance with a *general* personnel policy, with a more or less rational job evaluation scheme and a wage payment system imposed unilaterally by the employer. An unorganized hospital is no exception. Each employee may have a notional individual contract of employment, but the terms of those individual employment relationships will, in large measure, reflect compensation and benefit policies established for the entire employee complement, *as a collectivity*. Individual variations are likely to occur only at the margins or within pre-defined standards or progressions; and that is likely to be the case regardless of whether the regime is a product of collective bargaining or unilateral employer action, and regardless of precisely where one might draw the line between the "office", "service" and "paramedical/technical" bargaining units. One must be careful not to over-estimate the



impact of collective bargaining or the significance of alternative collective bargaining structures.

29. This is particularly so in a hospital setting where employer-employee disputes can *never* be the basis for a strike, or a test of relative bargaining power. The *Hospital Labour Disputes Arbitration Act* prohibits such action and substitutes, instead, various forms of adjudication. Integrated operations can never be shut down by a work stoppage in one part, or subjected to the pressures of picketing. Questions concerning work assignment, remuneration, or the wage-work bargain are resolved unilaterally by the employer, or through negotiations with the employees' representative, or are referred to a quasi-judicial rights or interest arbitration process based upon objective criteria. A number of problems identified by the Board in *Kidd Creek* and *Bestview* as potentially flowing from an *inappropriate* bargaining structure either cannot arise at all in a hospital setting, or are probably just as likely to arise regardless of where one draws the line between service and paramedical bargaining units. Moreover, these cases were particularly concerned with the problems flowing from fragmentation — as was *Stratford General Hospital* to a lesser extent. Here however, both parties accept the existence of a notional “generic” service unit, and a generic paramedical unit; and based upon various factors (including history) they have been able to agree on the “core” classifications in each generic unit. What is at issue is the periphery; and on the frontiers in the “gray area” one can plausibly argue *not only* that a disputed classification should fit into one generic unit or the other, *but also* that, for collective bargaining purposes, it could comfortably and suitably fit into *either* unit without jeopardizing its overall viability or appropriateness.

30. Apart from this case and *Stratford General Hospital*, *supra*, there really has not been much litigation concerning the precise parameters of the bargaining units in public hospitals. Early on, nurses were accorded their own bargaining unit — probably because, at the time, they were the only paramedical profession to indicate an interest in collective bargaining and, like many others, could demonstrate a distinct community of interest. Over time and through practice, the nurses have acquired almost a quasi-craft status which entitles them to their own distinct and separate bargaining unit. It is a claim based firmly on established collective bargaining practice, and whatever its merits, viewed with the benefit of hindsight, it is a claim that cannot now be denied.

31. The “service units” were also organized relatively early — office and clerical and paramedical units came somewhat later. But, unlike the present case, there was never much dispute between the unions and hospitals as to where the line should be drawn between the “office and clerical”, “service”, and “paramedical” bargaining units. Those problems were all resolved on a case-by-case basis on the agreement of parties who were able to make sensible work place judgments which, if not always consistent, seem to have proved to be workable in practice. Collective bargaining in public hospitals has not been without its difficulties, but (at least on the evidence and in the Board's experience) the contours of the bargaining unit have not been a serious cause for concern.

32. We will return to these themes after some brief discussion of the duties and responsibilities of the several classifications about which the Board has specific evidence.

## V

## THE TRANSCRIPT — AN OVERVIEW

33. It is unnecessary in these reasons to set out the precise details of the testimony or the supporting exhibits. That information is recorded in the transcript accompanying the Officer's report, and was supplemented by additional material filed at the further hearings before the Board itself. It will be sufficient to sketch in an overview of the general circumstances of the employees in the disputed classifications in order to highlight the issues posed by this case. We shall begin with a comment on the position of the RNA's and the related classification of nursing technician.

Registered Nursing Assistants (RNA's) and Nursing Technicians

34. CUPE and the Hospital are in agreement that, in accordance with well-established Board policy and collective bargaining practice in Ontario hospitals, the RNA's should be included in the "service" unit. However, Ms. Barclay, appeared on behalf of a group of RNA's to oppose their inclusion in the service bargaining unit. While it was sometimes difficult to distinguish her submissions respecting the bargaining unit configuration from those indicating opposition to unions per se, it is fair to say that the thrust of her argument was that the community of interest of the RNA's lay more with that of the RN's than with the members of the service bargaining unit.

35. Like the registered nurse (RN), the RNA is engaged in nursing practice under the regulatory authority of the Ontario College of Nurses. Pursuant to the *Health Disciplines Act* (R.S.O. 1980, c.196), the College establishes standards and qualifications for nursing practitioners, norms of ethical behaviour, and a complaints and discipline procedure. The minimum standards and criteria for the assessment of the practice of an RNA are summarized at pages 12-16 of the College's *Standards of Nursing Practice for Registered Nurses and Registered Nursing Assistants* (1983) filed with the Board. Exhibit #13 contains the Hospital's own general job description for the RNA position. Both documents suggest the same thing: that an RNA performs basic nursing functions, treatments and procedures broadly similar to those performed (or which may be performed) by an RN, but at a less sophisticated level. An RN must have a level of training beyond that of an RNA, must be able to perform functions which an RNA may not be trained for, and is legally authorized to undertake certain responsibilities (e.g., the administration of some medications) which an RNA is not permitted. On the other hand, both the RN and the RNA are ultimately subject to the direction of a physician, and, depending upon the circumstances, there can be a considerable overlap of functions. There are various medical procedures which can only be performed by an RN, but there are also a variety of duties which can be delegated by a physician to *either* an RN or an RNA (see pages 36-51 of the College of Nurses Handbook mentioned above). Obviously, the RN's and the RNA's must work closely together, even in a hospital such as the respondent where there is an unusually large proportion of RN's to RNA's. The RN's and RNA's must also work together and co-ordinate their activities with nurses' aides, orderlies, physicians, and such technical personnel as may have direct contact with the patients. However, in Ms. Barclay's submission, the important principle was the "professional recognition" of the RNA and the advancement of their "professional status".

36. While the Board does not in any way wish to minimize Ms. Barclay's concerns about the recognition of the "professional status" of the RNA's, the question before the Board involves the determination of an appropriate bargaining unit which reflects and will establish a viable collective bargaining structure. Protecting or promoting one group's claim to "professional" recognition is not a dominant concern, nor is this Board's opinion respecting an employee's

claim to “professional” status have much to do with the determination of an appropriate bargaining unit — in this context at least. Mr. Barclay’s submissions must be weighed against the well-established collective bargaining practices in public hospitals across Ontario: for the purposes of collective bargaining, RNA’s have regularly and routinely been included in the service bargaining unit, even though there might be a plausible claim to group them together with RN’s or perhaps with paramedical/technical employees.

37. The precise rationale for this established practice is not entirely clear, and may have more to do with the historical evolution of collective bargaining in the health care sector than any calculated assessment of what would ultimately be the most rational “shape” for the collective bargaining structure. Registered nurses had an early and active appetite for collective bargaining through an organization (the Ontario Nurses’ Association — “ONA”) which catered exclusively to the interests and concerns of their own professional group. ONA was not interested in, or able under its constitution to represent anyone other than registered nurses, and, at the time, the role of the RNA may not have been as developed, defined, or regulated as it is today. RN’s were regularly given their own separate bargaining unit. So it is today. While, in retrospect, and with the benefit of hindsight, RNA’s might conceivably have been included in a bargaining unit with RN’s or, alternatively, in a unit of paramedical employees (who typically organized, if at all, much later), the fact is that they were grouped together with nurses’ aides, orderlies, and other employees without established professional standing. There is no evidence to indicate that this determination produced any collective bargaining or administrative difficulties, even though the result has been that for years and in numerous hospital situations RN’s and RNA’s working side by side have been in separate bargaining units. Indeed, the historical treatment of RNA’s merely underlines the difficulties with the proposition that there is always and necessarily only one uniquely suitable “unit of employees appropriate for collective bargaining”.

38. Human institutions are a product of their history. Collective bargaining institutions are no exception. It is now too late to say that the RNA’s should not or cannot be appropriately included in the “service” bargaining unit. The overwhelming weight of established collective bargaining practice suggests precisely the opposite conclusion. Accordingly, despite Mr. Barclay’s submission, the Board is not disposed to exclude RNA’s from the service unit which the union seeks to represent.

39. What then is to be done with the “nursing technicians”? The evidence establishes that they work together with and under the supervision of a registered nurse. Although they are not themselves registered, their duties and responsibilities are substantially the same as those of an RNA. They have the same uniforms, hours of work, rates of pay, and benefits. The incumbents in that classification are described as “nurses” whose basic training programme (usually from other jurisdictions) does not fully meet Ontario’s registration requirements. They are senior employees who were hired in an earlier era when it was difficult to recruit RN’s. The classification is now an anachronism. No one is presently being hired as a nursing technician.

40. The union submitted (without much conviction) that the inclusion of RNA’s in the service unit might be regarded as something of an historical anomaly which the Board might not wish to expand. We do not agree. The nursing technicians and RNA’s are the same in all but name and registration; and while formal registration may be significant for some purposes, it is not for our’s. The inclusion of RNA’s in the service bargaining unit may be characterized as something of an anomaly (albeit one that is now well entrenched), but it seems to us that,



for collective bargaining purposes, the nursing technicians should be treated in the same way, and should be included in the service bargaining unit.

### Ward/Unit Clerks

41. The Hospital's position is that the ward clerks should be treated as ward personnel, like nurses' aides or RNA's, and should, therefore, be included in the service bargaining unit. CUPE submits that the ward clerks are essentially "clerical staff" who would more appropriately be grouped together with the Hospital's other office and clerical employees, or (in the alternative) that the unit which CUPE seeks to represent is appropriate without the inclusion of the ward/unit clerks.

42. The testimony and supporting material respecting the ward clerks takes up almost 100 pages of the Officer's report, but the essence of their duties is quite succinctly and accurately stated in just six words in the various Hospital job descriptions filed with the Board (exhibit #4 to exhibit #12). Under the heading "*Job Summary*", it is said that the ward clerk: "acts as receptionist and general clerk for [the name of the ward or clinic area]". These clerks provide receptionist, telephone message and clerical support for the nursing staff.

43. The precise functions performed by the ward clerks differ somewhat from ward to ward. They include such duties as: greeting and directing parents, visitors, and other staff to appropriate areas; answering telephone calls and relaying messages, information and test results to appropriate persons making inquiries; preparing paperwork applicable to the particular ward on such questions as patient admission, transfers, surgery, discharges, and the requisition of various tests; preparing charts for medical records; colour coding patients' information cards; copying time sheets from employee rotation schedules, filling in payroll sheets and handling related inquiries; filing various kinds of information; sorting mail; transcribing doctors' orders (apparently an increasing responsibility); preparing requisitions for some of the supplies used on the ward; paging doctors and making telephone calls at the request of nurses or physicians; assisting the nursing staff to compile statistics or other records; arranging for test appointments and clinic bookings; keeping a supply of appointment pads stamped with the doctors' names; organizing and filing histories or other ward information; ensuring that patient consent forms have been properly completed; ordering office supplies and forms as required; and a variety of miscellaneous duties.

44. The unit/ward clerks are part of the nursing department. They are supervised, evaluated, and, if necessary, disciplined by the head nurse. Typing skills are not a universal requirement although they appear to be necessary for some ward clerk positions. Much of the information can be handwritten and, the largest proportion of the clerks' time is spent as a receptionist, communicating information in person or by telephone. "Paperwork" is a residual, but nevertheless important function.

45. There is little lateral movement among the clerks or much interchange with other office and clerical personnel. For example, no one from the emergency admission sector has ever been transferred into the ward clerk positions, although some ward clerks moved into the admitting clerks' jobs when the department was integrated. Ward clerks are paid bi-weekly, with premium rates for overtime and payment for lunch and other breaks. Their passage through the established wage progression can be influenced by assessments of their merit. Their benefits are the same as those of other hospital employees. Because they are located in the nursing

station, their most direct and immediate contact with other employees involves communication with the RN's and RNA's. The ward clerks have contact with patients and their relatives, but are not involved in direct patient care. Although they have contact with other ward personnel, they are not likely to replace or be transferred or promoted to those positions. A ward clerk is most likely to remain as such, or, occasionally, may transfer to a similar position in another ward or hospital area.

46. It is apparent that there are factors which would support the inclusion of ward clerks in the service bargaining unit, and factors which might suggest that they could appropriately be grouped with the Hospital's other office and clerical employees. The work of a ward clerk revolves around a particular ward or clinic. They do not work in an office setting, and they receive most of their direction from the registered nurses on the ward. On the other hand, there are other Hospital clericals who do not work in a business office setting, the ward clerks' functions are of a "clerical character", and to the extent that their duties complement those of the registered nurse, it will be recalled that the RN's are not themselves in the service unit. Counsel for CUPE pointed out that in some wards there were, in fact, no RNA's.

47. The evidence respecting the ward clerks is equivocal, and this ambivalence is also reflected in the general collective bargaining practice. There is considerable variability in the way various hospitals have treated ward clerks and there is nothing in the evidence to suggest that one characterization should be preferred over the other. CUPE put before the Board a number of collective agreements in which ward clerks have been included in an office and clerical unit. The Hospital put before the Board a number of collective agreements in which ward clerks have been included in the service unit. Neither demonstrate a definitive position. The hospitals referred to are located in various parts of the province, are of different sizes, and include some teaching hospitals. For example, Kingston General Hospital and Toronto General Hospital are both teaching hospitals which exclude ward clerks from the service bargaining unit.

48. There are no Board decisions which definitively determine the position of ward clerks since no one has previously considered it necessary to address that issue. In *Owen Sound General and Marine Hospital* (cited *supra* at para. 14), the Board had to determine how to restructure bargaining units when a hospital was transferred from the government sector where *all* of the employees were included in one bargaining unit, to the jurisdiction of the *Labour Relations Act* where bargaining units had been structured quite differently. The Board in that case, without any explicit consideration of the issue, put ward clerks into the office and clerical group. So did the Board in *St. Joseph's Hospital, Windsor, supra*, where the Board (again without any issue being raised about the matter), excluded what was described as the "office and clerical staff" which included ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, and switchboard operators.

49. What inference can one draw from this diversity? In our view, it supports the proposition which we have discussed earlier; that on the margins, and in this industrial relations context, there may be particular classifications which can suitably and sensibly be allocated to one generic bargaining unit or the other. The evidence and the collective bargaining practice suggest to us that the ward clerks can fit quite comfortably into *either* an office and clerical unit or the service unit. In either case, the overall bargaining unit will be "appropriate". The union does not wish to represent them, there is no representation or indication from the ward clerks that they wish to be included in collective bargaining and the employee grouping which excludes them and which the union urges upon us is appropriate notwithstanding that exclusion.

In other words, whether the ward clerks are included or excluded from the “service unit”, that grouping of service employees is appropriate for collective bargaining. Accordingly, we accept the union’s submission that the ward clerks need not be included in its proposed bargaining unit.

### The “Technical” and “Assistants”

50. We turn now to the so-called “technical” employees, and in so doing, we embark to some extent on uncharted seas. Despite *Stratford General Hospital, supra*, neither the Board’s experience, nor existing industry practice appear to provide an unequivocal guideline as to how far down the job hierarchy of assistants, and technicians one can or should go before drawing the line between those employee classifications appropriately grouped with their “paramedical” co-workers, and those who should appropriately be part of a service bargaining unit. The information available to the Board suggests that the line is indefinite, and may well vary from hospital to hospital. Moreover, as we have already pointed out, a number of factors which may be significant in making bargaining unit determinations in other contexts are less helpful in a hospital setting. A focus on the employees’ functional coherence, day-to-day work relationships, and professional or supervisory “chain of command” might suggest a fragmented series of departmental bargaining units, and would ignore the extent to which certain employee groups (RN’s and RNA’s for example) appear to work effectively together even though they are in different bargaining units. For these technicians and assistants, there is little horizontal movement from one specialized department to another, nor much vertical movement up the job ladder except within narrowly defined and pre-established confines or as a result of the acquisition of additional education or accreditation. Standard hours and fringe benefits are basically the same for all employees across different potential units, and many of the most important working conditions are, and will continue to be substantially determined by the demands of the particular department rather than debate at the bargaining table. For example; wherever the line is drawn, there will be employees both inside and outside the “service bargaining unit” who will be required to work shift work, who will have a steady five-day week, and so on. Collective bargaining will not alter these realities. There is obviously considerable “job distance” between those at the top of the pyramid and those at the bottom; but the question is whether those obvious differences in rank can be translated into a particular and uniquely appropriate bargaining unit.

51. As before, we will not try to reproduce here the details of the testimony recorded in the Officer’s report. It will be sufficient to sketch in some of the background in order to illustrate the “flavour” of the evidence and the issues which we must determine. We should note, however, that, in proceeding in this somewhat abbreviated fashion, we have not ignored the thorough and thoughtful submissions of counsel for the parties who, in their own representations, carefully took the Board through many of the details of the testimony.

### (1)

52. The classification of “assistant technician, jr.” illustrates some of the difficulties to which we have already referred; for it appears that, within the ambit of this single job classification, there are employees performing quite different functions and in quite different work settings. They are all described in their job descriptions (generically, if somewhat inaccurately) as “lab assistants”. The classification consists of two employees working directly



in the lab, and ten to twelve “phlebotomists” whose primary responsibility involves taking blood samples from patients on the wards and in the nursing areas. They function in the division of clinical biochemistry under the ultimate authority of Peter Huggard, the chief technologist, who is involved in setting rates of pay and merit increases based upon evaluations forwarded to him by a supervisor. There are no formal entry qualifications for the assistant technician, jr. position other than a proficiency in the English language, a high school education, the completion of appropriate on-the-job training, and the ability to work with children. This latter ability is quite important because blood drawing is painful and frightening for the child, and may have to be done a number of times.

53. The two employees working in the lab have a side by side working relationship with the other laboratory staff. They do filing, data processing on the computer, clerical work for the lab staff, processing of blood samples prior to analysis by a registered technologist, and limited technical analysis. Their functions may be performed by other lab personnel. They have minimal contact with the service employee group, although such employees may pass through the lab from time to time, as when it is necessary to do cleaning.

54. The phlebotomists on the other hand do have some contact with patients and ward personnel (service and nursing), for their job involves taking blood samples which are subsequently transported to the lab for analysis. The transporting is usually done by someone from the service unit, but can sometimes be done by the phlebotomists if necessary. They need to be able to adroitly use tourniquets, syringes and blood pressure cups, to employ appropriate measuring vessels, and to respond accurately to specific test requisitions. Their supervisor is a non-registered technologist who co-ordinates the team, does the necessary training, and carries out various administrative duties. Nurses, doctors, and registered technologists may also draw blood samples when the phlebotomists are not scheduled or are unavailable. The phlebotomist would not ordinarily do work normally performed by employees in the service unit, but they may occasionally transfer blood samples and, when moving from ward to ward, must co-ordinate their activities with whatever is going on at the time. The phlebotomist is trained to determine the priorities in drawing blood — that is, to handle blood sample requests in the appropriate order; however, the actual requests for blood samples and testing are generated in accordance with medical assessments of the need to the patients in the various wards. The lab staff will only rarely order blood samples. The phlebotomist group appears to function relatively autonomously and they even have their own staff room. But there are no other special benefits and the terms and conditions of employment and pay scales are the same as their fellows working in the lab, while their employee benefits are the same as those of other Hospital employees. Obviously their skills and training are much less than those of the higher order technologists undisputably included in the paramedical bargaining unit while, on the other hand, their reporting relationships and treatment by the Hospital suggests a relationship with the other laboratory staff.

(2)

55. The pharmacy employees make up a somewhat larger group and their department includes a fairly clear hierarchy involving pharmacists, pharmacy assistants, and pharmacy technicians. There are also porters in the department who the parties are agreed should be part of the service unit. There is no dispute that the pharmacists are clearly part of the paramedical bargaining unit. The question concerns the proper placement, for collective bargaining purposes, of the pharmacy assistants and pharmacy technicians who have a close working relation-

ship with the pharmacists (to whom they are ultimately responsible), but who obviously have much less training.

56. The responsibilities of the *pharmacy assistant* include a variety of functions associated with the packaging, distribution and control of drugs, as well as sterile and non-sterile manufacturing at various pharmacy stations in the Hospital. It was estimated that their most significant task, consuming some seventy per cent of their time, is in drug preparation. However, they never work unsupervised and the duties which they perform are regulated by the *Health Disciplines Act* and the guidelines provided by the College of Pharmacists. The pharmacy assistants are responsible to the staff pharmacists, are expected to hold a pharmacy assistants diploma from a community college (or equivalent hospital experience), and in some cases previous hospital experience is not only desirable, but essential. The general job description includes the following tasks:

Performs all tasks related to packaging, labelling, distribution and control of drugs dispensed from the pharmacy to in-patients, out-patients, and other Hospital departments under the supervision of a staff pharmacist. This includes drugs dispensed in energy drug boxes, maintains perpetual inventory records for control drugs and clinical investigation and emergency-released drugs as required. Carries out drug recall for patients and other Hospital departments and subsequent disposal of discontinued or outdated drugs. Performs tasks related to sterile and non-sterile manufacturing, including preparation, packaging and labelling. Assists in the provision of drug information services as required. Assists in the accumulation of data for statistical purposes. Performs the activities of cashier or pharmacy technician as required. Provides essential pharmacy service on evening and weekend tours of duty as set out in the assistant's schedule.

57. The *senior pharmacy assistant* also has certain supervisory and co-ordinating functions vis-a-vis other pharmacy assistants and technicians (as assigned) and assists the pharmacist supervisor in these administrative functions. He undertakes some training of new pharmacy assistants and represents his fellow assistants in discussions respecting the implementation of new procedures. The senior pharmacy assistant is expected to have not only a community college diploma, but also two years' previous experience working for the respondent.

58. There is no code or professional conduct or other trappings of "professionalism" for the disputed employees and, it appears, they have not travelled very far down the road of "professionalization". But the College of Pharmacists has considered it necessary to set out in some detail those functions properly assigned to a pharmacy assistant and those exclusively to be performed by a pharmacist or to be performed under quite specific supervision by a pharmacist (see exhibit #26).

59. The four *pharmacy technicians* are obviously further down the job hierarchy, not only in terms of required education, but also job responsibilities. They too report to a staff pharmacist and their job description describes their duties as:

The technical functions associated with the packaging, distribution, manufacture and inventory control of pharmaceutical products. . .labelling, packaging and arranging distribution to nursing units of pharmaceutical products; labelling, packaging and arranging distribution to nursing units of pharmaceutical products; inventory control and stock rotation of supplies and manufactured products in the central pharmacy and as required on nursing unit; monitoring medication orders and inventory to determine appropriate quantities for manufacturing; cleaning and decontaminating items used in the manufacture of pharmaceutical products; maintaining records and files, reports of quality control tests, for manufactured items within the guidelines set down by the supervising staff pharmacist; typing memos and reports as required; performing other related duties as assigned.

Their job requires only grade 13 education, typing skills, and some experience. They use fairly simple packaging equipment and measuring devices. However, it appears that their functions are not shared with service or clerical employees. Rather, the overlap is with the pharmacy assistants who form the next layer in the job hierarchy and who ordinarily perform more complicated functions than the technicians (involving the manipulation of dosages for particular patients), but may also perform the technicians' functions when required. It also appears that if a pharmacy technician is engaged in a programme of self-improvement through taking extra courses, he is given extra responsibilities approximating those of the pharmacy assistant.

60. It is apparent that the four pharmacy technicians are primarily involved in a kind of clerical and inventory work and with the packaging and handling of drugs, requiring little formal training, specific knowledge, or independent discretion, while the seventeen pharmacy assistants are the basic technical support staff for the pharmacists having more responsibility than the technicians and performing (according to their own abilities) more complicated tasks (related to preparing dosages) than those normally allocated to the technicians. In this sense, they act as the agent for the pharmacist to whom they are ultimately responsible. However, the control of drugs is a critical concern of the Hospital, so that all employees in the pharmacy department are required to keep careful records of their duties and to cross-check each other's activities in order to avoid any possibility of error.

61. A pharmacy technician would not easily progress to the pharmacy assistant level without acquiring further training at a community college, however, exhibit #25 suggests that for someone possessing a high school diploma, this education gap can be bridged by a two semester diploma course. This is not a particularly difficult hurdle, moreover, the evidence is that not all of the incumbent pharmacy assistants actually have community college training. A significant proportion have no community college training, but only direct on-the-job experience. At least two technicians have progressed to the assistant level by taking evening courses at a local community college.

62. There is no interchange or significant contact with the doctors or nurses or other ward personnel, or with the service employees other than those porters who work in the pharmacy department (and wear different uniforms). A doctor or nurse who has questions concerning drugs or dosages, addresses those concerns to the pharmacist, not his associates. While in some sense the pharmacy technicians perform clerical functions, they are not replaced, as needed, by clerical employees. Actual employee hours depend very much upon where the employee is assigned and, in particular, whether the employees are working in the central or satellite pharmacies. Pharmacy assistants and pharmacists can work on all shifts and all days, and can get overtime or time off in lieu thereof. As in other Hospital departments, the employees' work pattern is determined more by patient need than by professional status. Pharmacy assistants, pharmacy technicians, and pharmacists all rotate or may work "off shifts".

### (3)

63. The employees in the orthotics department are concerned with the design, fabrication and fitting of braces, splints, and remedial sitting devices. The employee classifications are: orthotist, technician, technician II, seating technician (which is equivalent to technician II), and a variety of trainees. Evidence respecting their functions was given by Stewart Young, the assistant director who is himself a certified orthotist. In Canada such orthotists have not yet achieved the professional standing and recognition of, for example, pharmacists, but there



is a National Association which holds conferences, conducts examinations, and confers "certification" or "registration" on orthotists or technicians, respectively. The role of the orthotist is continuing to evolve, and we might note that in this group, there was a particularly striking discrepancy between the formal qualifications listed as required or desirable and the actual background of the incumbent employees. However, it appears that by the time the various trainees reach the end of their career path, they will have those qualifications. Accordingly, the situation of the present incumbents may not be representative of what is likely to be the case in the future.

64. Mr. Young suggested that for registration as a technician, one should have five years of hospital training supervised by an orthotist, or a two-year diploma from George Brown College and twenty months of training. In either case, registration would follow successful completion of written and practical exams. But Mr. Young, who is a certified orthotist, has not himself completed such formal training programme and despite the job description, neither the technician II, nor the seating technician have the required grade 12 education plus post-secondary training at a community college. Moreover, when the various college courses were reviewed with Mr. Young, it was apparent that however desirable they may be, they are not necessary for the actual functions of the job which still has a profoundly mechanical orientation (welding, working with plastics, metal fabrication, casting, working on a lathe in the shop, etc.). Ugo Miciele, a technician II, could really be described as a skilled shoemaker, trained in Europe, who specializes in designing and making orthopaedic shoes. His associate, a technician I, also has shoemaker's training. It appears that these individuals are "a rare breed" for which there is currently no Canadian counterpart — hence their importance. In their case, there is a substantial overlap between the duties of the two employees with Miciele concentrating more on design and fitting and consultation with an orthotist, and the technician I, concentrating more on fabrication.

65. The list of duties of the technician (set out in their job description) is as follows: takes measurements of body deformity and draws pattern of body members to be fitted; makes plastic casts from master mouldings used in the manufacture of orthotic devices; determines specifications of appliances under the direct supervision and consultation with a certified orthotist; selects appropriate materials, fabricates and assembles appliance; assists in fitting appliances to patients and makes necessary adjustments; may instruct patient in use of device; repairs. In summary, he "designs, makes and repairs orthopaedic appliances and special equipment of moderate complexity and assists in the fitting of appliances". The difference between the orthotist and the orthotic technician is one of focus or concentration. Young indicated that he still spends a good proportion of his time fabricating because of the need for careful fitting and readjustment to meet the requirements of growing children. He too operates a lathe, works with hot plastic, and often will be involved with the creation of an orthotic device from start to finish. But in addition, the orthotist is likely to have a larger role in consultation with the physician doing a clinical assessment of patient needs and creation of basic designs. Because the technician II (shoemaker) exercises certain unique skills and responsibilities for which orthotists are not trained, he too may work more closely with a physician.

66. It is obvious that within the department there is a very substantial overlap of functions. Young suggested that some fifty per cent of the technician's time was involved in fabrication and the next most important component was assisting the orthotist with fittings and repairs. Both groups exercise a fair amount of independent judgment in technical and design matters and engage in a constant dialogue to modify and perfect the designs. The difference is that

the orthotist has a greater role in assessing patient needs and more interaction with the physicians.

67. There is also a considerable amount of functional overlap with the trainees — as might be expected in what approximates an apprenticeship relationship. The degree of overlap and responsibility accorded to the trainee depends upon how far he has advanced and, of course, the complexity of the problem. The trainees will also have occasion to work with the orthotist and a physician, since it is necessary for them to learn their respective roles. But as in the case of the other disputed groups, there is no working relationship or interchange with the employees in other specialized departments or with RNA's or other service employees. They do, however, have similar benefits. There is no shift work, and ordinarily no overtime. The employees are paid on salary and wear the familiar white lab coat. Usually the patients come to the orthotic department unless for some reason they are immobile, in which case the orthotists and technicians (with trainees) will visit the ward.

(4)

68. The employees in the animal research facility are organizationally separate from the clinical side of the Hospital, having separate financing, administration, and a reporting structure directly to the Board of Trustees. The animal research facility has separate and discrete physical quarters, there is a separate containment unit where animals may be injected with, or are carrying various diseases, and there is a breeding farm in Georgetown. For obvious reasons, the employees who work with these animals do not have contact with patients or employees involved in patient care, although there may be what was described as an "interface at the technical level" with other hospital labs and research areas. The employees in the animal research facility also work with visiting research teams who use the labs for their own special projects. The employee groups dealt with in the testimony were: technician I, technician II, and animal attendant.

69. As usual, there is some overlap of functions, both manual and technical, and considerable job distance between the attendants who perform more of the routine animal husbandry functions and the technicians. However, Carl Grant, the director of the facility, indicated it would be wrong to regard even the attendants' role as purely one of animal husbandry. Their functions are assuming more of a technical aspect and he suggested that a continuing problem is the performance of functions which could be better done and understood if the individuals had a better grounding in chemistry, genetics, etc. Again, the situation is in a state of flux so that the present incumbents — particularly at the animal attendant level — may not be representative of what is to come. Mr. Grant suggested that today, even for the animal attendant, the Hospital would require grade 13 and a Sheridan College diploma. The Canadian Association of Live Animal Sciences currently conducts a training programme, registration and certification, which, although not required, would be desirable. Moreover, the community colleges are increasingly taking over the training function and developing their own programs. Mr. Grant suggested that the Hospital certainly would not now consider transferring or appointing a "porter" to the animal attendant position. He said he would "even object to the thought". That portion of the job description was said to be out of date, even though the evidence indicates that one incumbent (a long time employee who had a heart attack and was placed on "light duties") is currently doing pick-ups and deliveries, and another is regularly engaged washing cages, bottles and racks with various cleaning machines. It was said that some fifty per cent of the animal attendants' time is involved in: "providing food and water for animals

as instructed; cleaning animal cages and disposing of waste; cleaning counter, shelves and materials; washing floors and rooms and disposing of garbage; incinerating animal waste products; and, observing animals for signs of medical or behavioural abnormalities which must be reported to a supervisor". Grant testified that, with experience, the animal attendants will increasingly perform some of the functions of, or work together with the technicians. Under supervision, they too would treat animals for mites, trip teeth, drain and treat abscesses, take blood, do intravenous injections, handle I.V. drips and generally assist the tech II in his functions. If the tech II is doing testing, for example, a tech I or attendant may prepare the slides. Since the attendants tend to be assigned to particular species, they will work with the visiting researchers when that species is involved.

70. The technician II is now expected to have grade 13, plus a three-year animal technician diploma "as an absolute minimum" and registration; and it appears that they are more likely to actually have these qualifications. They work most closely with the doctors and research scientists and are expected to keep updated through their own association. They are the technical link with other departments and in Mr. Grant's view were the equivalent of research technicians (a group it appears the parties have agreed to *exclude*). They don't ordinarily do feeding, watering, or cage cleaning, but are more involved in diagnostic testing (parasitology, urine, microbiology, haematology) and the treatment of animals for abscesses, disorders, infections, and parasites. They are expected to monitor and appreciate the significance of animal symptoms, and, of course, record and report their observations for research purposes and the use of the veterinarian and supervisors. The tech II must have some understanding of drug interaction for treatment and research purposes, as well as some knowledge of shock and fluid therapy. They operate anaesthetic machines and perform minor surgery — although here too the others may assist and even do some suturing.

71. The technician II in the containment area must also have some special knowledge of contagious diseases and sterile conditions because that is an area where there is some biomedical danger. The technician II at the Vivarium Farm in Georgetown requires a B.Sc. in agriculture, (or equivalent training and experience) in addition to grade 13. His responsibilities involve the breeding programme, and can include various kinds of testing and some surgery. His specialized experience is with large domestic animals. He needs the formal agricultural training because the research programme is carried out in a farm setting. On the other hand, because the technician II in the containment unit and at the farm work in more autonomous groups, they will be required to perform some of the more mundane functions too, and in the case of the farm, some manual labour. A technician I can no longer progress to the technician II level without more formal training.

72. The role of the technician I is somewhere in between. He is more likely to do some of the manual animal husbandry activities, more typically done by the animal attendants, but, given his experience or greater technical training, he will also perform some of the technical functions under the supervision of the technician II. For example, the technicians I or even more senior attendants will be giving injections, caring for pregnant animals, taking blood samples, doing cardiac and stool testing, and treating mites, abscesses, infections and disorders under the supervision of the technician II. The technician II attends special technical training sessions as often as one day a week, and are then expected to pass on this knowledge to the technician I. Similarly, the technician I will operate much of the lab equipment that a technician II would also use, depending upon the complexity or sophistication of the task.



73. The technicians have a standard thirty-five hour week, with time off in lieu of overtime, except that the technician II may be paid time and a half when, on rotation, they cover a weekend shift. The animal attendants have a standard thirty-eight and three-quarter hour week. Lunch and coffee break times vary, as they do from department to department. However, standard benefits are generalized across the Hospital. Because these employees work with animals, they have a distinctive grey uniform which is different from all others in the Hospital. There is no contact with service employees except in cases where they come to repair the physical plant or equipment. It is interesting to note that Mr. Grant did not anticipate drawing on the hospital's general staff for part-time help, or to fill vacancies. He suggested that if employees were absent the others would simply have to cover for them, or, in some cases, university students in the biological sciences would fill in.

## CONCLUSION

74. Upon an application for certification, the Board must determine the unit of employees appropriate for collective bargaining in the context of that application, in light of the circumstances before it, and in view of the overall policy considerations which appear to be relevant. Here the situation of the "technicians" is somewhat ambiguous. If one were to focus on their level of education and skills, one could plausibly argue, as the employer does, that they could comfortably and appropriately fit within the service unit. There may not be any compelling public policy reasons for such determination (for example, the undesirable spill-over effects of industrial conflict mentioned in *Kidd Creek, supra*), nor any well-established collective bargaining practice (as in the case of the RNA'S), but the Hospital is quite right when it points out that the service unit has traditionally encompassed quite a diverse employee grouping ranging from orderlies, cleaners, kitchen staff, skilled electricians, and RNA's (admittedly something of an anomaly). On the other hand, departmental divisions, reporting structures, functional overlap, the lack of significant contact with service employees, and the Hospital's own designation of these employees as technicians of one grade or another, all point to their *exclusion* from the service unit, and inclusion at the lower levels of the paramedical bargaining unit. The departmental segregation is particularly striking in the case of the research facility employees.

75. Now, obviously, there is no magic in job titles. But the Hospital's characterization of these disputed employees is not entirely anomalous. There is a tangible, if sometimes limited, "technical component" to these jobs and even the lowest levels can claim a place in the technicians' hierarchy (in part, because of the Hospital's own treatment of them). And, if anything, the evidence suggests that the technical aspect of their work is increasing and will continue to increase as the Hospital demands more specialized training, more post-secondary education, and more sophistication of those whom it hires in what it describes as technician positions.

76. There is also something to the union's submission that the employees who seek its representation sought to organize themselves along traditional "service lines", excluding technical personnel. While there may be no Board cases dealing with the disputed categories, the Board in *Stratford General Hospital, supra*, did refuse to distinguish between paramedical and technical personnel, and the Hospital, prior to any question of any trade union organizing, decided in its own mind, that these individuals should be designated as "technicians". It is probably wrong to raise this aspect of the case to a significant "reliance interest" as the union suggests but, given the notional paramedical bargaining unit, it is neither surprising nor

unreasonable that when the service employees sought to organize themselves for collective bargaining purposes they could suppose that the technicians and animal research group would be excluded. One can also appreciate the union's submission that the service employees may have some difficulty understanding why *their* opportunity to engage in collective bargaining has, at the very least, been significantly delayed by a consideration of the position of employees who have themselves indicated no real interest in being represented by any trade union. To the extent that one gives weight to such factors as ease of employee self-organization and avoidance of litigation with its inherently prejudicial costs and delays, these factors point to the acceptance of the narrower unit the union seeks to represent — so long as it is viable and appropriate — and even if in somewhat different circumstances some broader unit might also be considered appropriate. The disputed employees lie in the “grey area” where one could reasonably argue that they could be included in either the service unit or a paramedical unit; and, having considered the evidence and representations we are persuaded that the overall viability and appropriateness of the service unit will not be affected one way or the other by the inclusion or exclusion of the particular disputed “technical” classifications about which we have concrete evidence.

77. On the basis of the totality of the evidence before us, (and, bearing in mind that this is an interim decision) we conclude that, except for the RNA's and Nursing Technicians, the service unit sought by the applicant union is appropriate and both can and should exclude the various technical personnel and so-called lab assistants who were the subject of the Board Officer's inquiry and interim report. They could sensibly be included in a paramedical bargaining unit should the majority of such employees seek to organize themselves and engage in collective bargaining. Similarly, the ward clerks could be included in an office and clerical bargaining unit.

78. Because this is only an interim report dealing with only a few of the so-called “technical” employees whose status remains in dispute, the Officer is hereby authorized and directed to meet further with the parties and explore their positions in light of the Board's interim decision. In the event that the parties are unable to compose their remaining differences, the Board may direct that the respondent set out in writing its position on the duties and responsibilities of the remaining disputed categories and why in light of this decision, they should be included in a bargaining unit together with service employees. The union will likewise have an opportunity to reply and, if necessary, the Board may schedule a “show cause” hearing.

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**2913-84-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Kenting Earth Sciences Limited, Respondent**

**Certification — Practice and Procedure — Representation Vote — Disputes as to appropriate unit and Board's constitutional jurisdiction — Employer raising concerns as to inability of employees on foreign assignments to vote — No hearing prior to pre-hearing vote to resolve issues**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**DECISION OF THE BOARD;** February 20, 1985

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2. This is an application for certification in which the applicant has requested that a pre-hearing vote be taken.

3. In accordance with its usual practice, the Board by order dated January 30, 1985, appointed a Labour Relations Officer to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of any vote which might be directed and other matters relating to entitlement to and arrangements for such a vote. The Officer so appointed met with representatives of the parties on February 15, 1985.

4. The applicant seeks certification with respect to certain employees of the respondent working at Ottawa, Ontario. In addition to its "head office" in Ottawa, the respondent has employees at facilities in the Township of Gloucester, just outside Ottawa, in Toronto, Ontario, and in other centres outside Ontario. If this Board has jurisdiction over its labour relations, a matter the respondent challenges as we note later, the respondent takes the position that the appropriate unit of employees on this application would be all of its employees in the Province of Ontario. In the alternative, it takes the position that the appropriate unit would include both the employees at its head office in Ottawa and at its premises in Gloucester Township. The applicant would have us find the appropriate units to encompass only the employees working at and out of the head office. The applicant does not have membership support sufficient to permit testing employee wishes in a voting constituency broader than the bargaining unit for which it seeks certification. Without prejudice to the respondent's position with respect to jurisdiction and the appropriateness of a unit consisting of employees at a single location at Ottawa, the parties have agreed that that unit, if appropriate, would be defined as follows:

All employees of the respondent working at or out of its head office at Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.



Having regard to that agreement, the Board determines that all employees in the unit described shall constitute the voting constituency for the purpose of the request for a pre-hearing representation vote.

5. The parties disagree on the composition of the voting constituency. Of the employees named by the respondent in the lists submitted with its Reply, the applicant challenges:

- (a) Jerome Chyurlia, Gerald M. Grace, Edwin Hall and Jan Zonneveld, on the ground that they exercise managerial functions within the meaning of clause 1(3)(b) of the *Labour Relations Act*;
- (b) Mehdi Kazemzaden on the ground that he/she is an office employee and/or exercises managerial functions within the meaning of clause 1(3)(b) of the Act; and,
- (c) Vladimir Belohlavek, on the ground that he is an office employee excluded by a definition from the voting constituency.

Whether these persons are or are not employees in the voting constituency, it appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency herein before described were members of the applicant at the time the application was made.

6. The respondent takes the position that this Board is without jurisdiction to regulate its labour relations because, it submits, the regulation of those labour relations falls within the exclusive jurisdiction of Parliament. The grounds for that claim are not expressly asserted in the respondent's Reply, nor in its counsel's letter to the Board of February 19, 1985, in which the claim is reasserted. The respondent describes its business as "Aerial surveys, Mapping, Airborne Geophysics, Resources Development, Hydrography", and it advised the officer that it bases its challenge to the Board's jurisdiction on the fact that it employs aircraft in the performance of its business. In their meeting with the officer, the parties agreed that the ballot box should be sealed pending determination of that issue.

7. One of the matters the Labour Relations Officer was to and did confer with the parties on was the arrangements for any vote which might be directed by the Board. In that connection, the respondent advised the officer that it was possible that persons eligible to vote might be out of the country on any given day on which any vote might be held. The respondent did not offer any suggestions on vote arrangements which might be responsive to this concern; it merely advised the officer that it would be "making representations to the Board on the eligible voters' opportunity to vote". In that context, the vote arrangements proposed by the officer as a result of his meeting of February 15th with the parties involve the conduct of a vote on either February 28 or March 7, 1985, with polls open in the lunchroom at the respondent's head office in Ottawa between the hours of 6:15 to 6:30 a.m. and 3:30 to 4:30 p.m.

8. On February 19, 1985, counsel for the respondent wrote to the Board. After noting again the respondent's challenge to the Board's jurisdiction and the dispute over the geographic scope of the appropriate bargaining unit, counsel says:

Furthermore, within the bargaining unit sought by the Applicant, there are a number of employees who are presently on assignment in both Thailand, Nigeria and Nepal. While these employees are not expected back by February 28th, the date scheduled for the vote,

they will be returning to their duties at the Respondent's Head Office when their assignments conclude and therefore have a significant interest in the outcome of the application.

The Respondent therefore requests that the Board schedule this matter for a hearing as soon as possible in order that the Board may address the following issues:

- (i) whether, in the circumstances of this case, the Board ought to determine its jurisdiction to entertain the application and the scope of the appropriate bargaining unit prior to conducting the vote;
- (ii) should the Board determine to assume jurisdiction and conduct a representation vote, the manner in which those employees falling within the bargaining unit proposed by the Applicant on overseas assignment at the date of the vote may cast their ballots.

These submissions betray a fundamental misconception of the nature of these proceedings. A "pre-hearing representation vote" is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result. It is at that time that matters going to jurisdiction are addressed, as where the applicant's status as a trade union is in doubt: *Emery Industries Limited*, [1980] OLRB Rep. March 316. We do not consider it appropriate to hear the respondent's jurisdictional challenge before conducting a representation vote.

9. As for the matter of the vote arrangements, these will be determined in this case, as in every case in which a pre-hearing vote is requested, on the basis of the material filed prior to the terminal date and officer's meeting with the parties, the submissions made to the officer appointed by the Board to confer with the parties on that and other matters affecting the application, and any subsequent written submissions to the Board which the officer may have invited (as in this case) or directed. The respondent has not provided information on the number of employees who may be unable to vote on February 28th or any other potential vote date. It has not proposed any other time or method of conducting a vote. Instead, it has asked that we schedule a hearing to receive unspecified submissions which it has declined to make either to the officer appointed by the Board or in its letter to the Board. We see no reason to make pre-hearing representation vote arrangements the subject of a pre-vote hearing and thereby delay what is intended to be an expeditious process. The adequacy of the vote is a matter which can be addressed, after the vote is conducted, on any ground which may fairly be raised at that time, bearing in mind the opportunity the parties have already had to make representations both through the Board's Labour Relations Officer and otherwise.

10. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondent in the aforesaid voting constituency. All employees of the respondent in the voting constituency on the 7th day of February, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between that date and the date the vote is taken will be eligible to vote.

11. The employees named in paragraph 5 of this decision as having been challenged by the applicant shall be entitled to cast segregated ballots. Voters will be asked to indicate whether

or not they wish to be represented by the applicant in their relations with the respondent. The ballot box is to be sealed and the ballots not counted, unless on agreement of the parties, without further order of the Board.

12. The matter is referred to the Registrar pursuant to section 68 of the Board's Rules of Procedure, and he is directed to list this application for hearing after the vote directed herein is conducted.

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**2651-83-U Richard McCormick, Complainant, v. The International Association of Machinists and Aerospace Workers Local Lodge 1673, Respondent, v. Worthington Canada Inc., Intervener**

**Duty of Fair Representation — Unfair Labour Practice — Discharged grievor not seeking union's assistance — Whether union nevertheless having duty to file grievance or seek extension of time limits — Discharged employee not ceasing to be employee for purposes of representation duty**

**BEFORE:** Owen V. Gray, Vice-Chairman.

***APPEARANCES:** James Ion for the complainant; James V. Goodison, Russell Wilson, Ron Houston, Vern Micks, Lloyd Perrin and Bob MacKay for the respondent; Wallace M. Kenny, Keith Robinson and Ron Whitfield for the intervener.*

**DECISION OF THE BOARD;** February 18, 1985

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2. Richard McCormick was employed by Worthington Canada Inc. ("Worthington") until August 9, 1983, when he was discharged. He was one of about 70 employees in a bargaining unit represented by The International Association of Machinists and Aerospace Workers Local Lodge 1673 ("the union"). At the time of McCormick's dismissal, the union and Worthington were parties to a collective agreement under which any alleged lack of just cause for discharge could be the subject of a grievance and, ultimately, arbitration. McCormick's discharge was not the subject of a grievance; that, in essence, is McCormick's complaint against the union in these proceedings. In his complaint dated February 13, 1984, he alleges that:

On or about the 8th of [sic] 9th of August, 1983, and again on or about the month of December, 1983 the grievor was dealt with by Russell Wilson, President of the Respondent Local 1673 of the respondent company [sic] contrary to the provisions of section 68 of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent act in a manner that is arbitrary, discriminatory, or in bad faith, by refusing to represent the interests of the Complainant who had been dismissed by the Company, without hearing the Complainant's version of the events leading to the Complainant's dismissal and by reaching the decision whether or not to fairly represent the Complainant based solely on information supplied by representatives of the Company, Worthington Canada Inc.

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The Complainant was dismissed by the Company for allegedly stealing company property. The Complainant honestly believed at the time that he had the Company's permission to have possession of certain articles of company property off the company premises. When the Complainant approached Russell Wilson at the time of his dismissal, he was told that there was nothing the union could do for him and the Complainant was not given an opportunity to represent his version of the events. After consultation with legal counsel on or about the month of December, 1983, the Complainant again approached [sic] Russell Wilson to seek representation by the Respondent of the Complainant's position. At that time the Complainant was advised by Russell Wilson that it was simply to [sic] late to do anything; but, Russell Wilson did offer to attempt to obtain a grievance form and mail it to the Complainant. After one week, the Complainant again contacted Mr. Wilson to inquire as to where the grievance form was and the Complainant was advised by Mr. Wilson that he would not be receiving any grievance form.

3. As a result of an investigation by Worthington into the whereabouts of missing tools and equipment, police officers visited McCormick's home on or about August 4, 1983, and asked him whether he had anything which belonged to Worthington. He told them he did, and took them to the basement where he showed them certain items of company property which he claimed were in his possession with the permission of the company. The police took them and him to the police station, where he was charged with theft. Earlier that day the police had visited Lloyd Perrin, a fellow employee of McCormick's, to search the garage which Perrin had been renting to McCormick until that month. On the following Monday, August 8th, a third Worthington employee, Robert MacKay, was called into the plant superintendent's office. He was told that the police had found items belonging to Worthington in his garage; he explained his garage was rented to McCormick. When he left that meeting, MacKay spoke to Russell Wilson, President of the union. MacKay told Wilson he believed he might be fired, and that McCormick would be fired "for sure". Wilson asked why, and MacKay told Wilson what he knew of the police visit to McCormick's home and search of the garages of Perrin and MacKay. After reviewing the matter with MacKay, Wilson discussed it with the plant superintendent (as he then was), Ron Whitfield. Whitfield told Wilson about the searches and the company's position that McCormick had taken company equipment without authority. He said that no action would be taken against Perrin and MacKay. Wilson's next action was to call McCormick.

4. McCormick acknowledges receiving a telephone call from Wilson. He says Wilson told him he had spoken to Whitfield and Robinson (Worthington's Human Resources Manager), and that they would be dismissing him and would send him a registered letter to that effect. McCormick says Wilson then told him that he had spoken to James Goodison (the I.A.M. Grand Lodge Representative who services the respondent local union), and that McCormick should seek legal counsel. In his examination-in-chief, McCormick at first said he *interpreted* Wilson's remarks to mean that there was nothing they could do for him and that he ought to get a lawyer. Later in his examination-in-chief and in cross-examination, when asked to explain why he did not file a grievance or take the matter to a union meeting, McCormick said it was because Wilson had *said* that the union *could not* do anything. At one point in cross-examination, he claimed Wilson had said that the union *would not* do anything. McCormick remembers only one telephone conversation with Wilson that August.

5. Wilson says he initiated three telephone conversations with McCormick: one after Wilson's conversation with MacKay and two more the following day, one before and one after Wilson learned that McCormick would receive the registered letter concerning his dismissal. In the first conversation, Wilson asked what had happened. McCormick confirmed that the police had searched his basement and found company equipment, and that he had been charged.

McCormick said he had had permission to take the items in question out of the shop. Worthington had an established policy that no company property of any kind was to be removed from company premises without the written permission of Whitfield, the plant superintendent. Wilson asked McCormick to see if he had anything in writing, and said that he would telephone Goodison to find out what could be done. He spoke to Goodison that evening. The following morning he called McCormick again. He told him he should cover himself with respect to the criminal charges by hiring a lawyer. He asked if McCormick had found anything in writing. McCormick said no. Wilson then said it would not be easy, but that McCormick should come in and see him, that they would go through the grievance procedure and see what happened. Shortly thereafter, Wilson learned of the registered letter confirming the company's decision to discharge McCormick, and called McCormick back to tell him that the letter was on its way. Wilson says McCormick told him he would be in to see him.

6. Perrin and MacKay both had conversations with McCormick after he was charged, either just before or just after he was dismissed. Each says he told McCormick he should see the union. McCormick told Perrin he would take care of it himself; he told MacKay he did not need the union. McCormick admits both conversations, but adds that he told Perrin and MacKay that the union would not or could not help him. Neither Perrin nor MacKay recalls McCormick saying that.

7. Whitfield testified that McCormick approached him on two occasions after his arrest: on Friday, August 5th, and again Monday, August 8th. McCormick had told the police that Whitfield and a foreman named Robillard had given him permission to take the company property found in his possession. When McCormick spoke to Whitfield on August 5th, he asked if Whitfield would back him up. Whitfield had not given permission with respect to the tools in question, and told McCormick he would not lie about that. McCormick returned the following Monday just before noon, and asked to speak to Whitfield again. Whitfield thought it best not to meet with McCormick alone. He told McCormick he wanted Keith Robinson present, and suggested that McCormick should have a union representative present. Whitfield says McCormick responded by saying, "I don't need them fucking guys — let's go on with it". They went on to Robinson's office, where Robinson also suggested that McCormick should have a union representative present. McCormick again rejected the suggestion. The note on which the meeting ended was that Whitfield and Robinson were treating the matter with the utmost seriousness, and would notify McCormick after they had sought counsel of senior management on the next step.

8. McCormick denies that either Whitfield or Robinson ever suggested he have a union representative present at his meetings with them. He claims he did not seek one out because none was about and, in any event, he did not think his job was in jeopardy. As to the availability of a union representative, Wilson testified that he saw McCormick, and McCormick saw him, on August 8th when McCormick came to see Whitfield the second time. Wilson was surprised McCormick did not come to see him then, and questioned Whitfield about that afterwards. Whitfield told him of the suggestions he and Robinson had made and of McCormick's having said he did not need the union present. As for McCormick's perception of the seriousness of his position, Whitfield testified that he told McCormick it was a serious matter and that during the meeting McCormick himself said he could lose his job over the theft allegation.

9. McCormick received the August 9th registered letter terminating his employment. He admits he was aware of the five working day period within which Article 11.3 of the collective agreement required that any claim of unjust discharge be initiated. He did not go to see Wilson.

No grievance was filed. There was no further telephone conversation between McCormick and Wilson in 1983. Although he had retained a lawyer to represent him with respect to the criminal charges, McCormick did nothing about his dismissal until late December, 1983, or early January, 1984, when he spoke to the retired former personnel manager of Worthington. He drew McCormick's attention to section 68 of the Act and suggested that he try to file a grievance before taking any action under that section.

10. On or about January 11, 1984, McCormick attended at the Worthington plant and tried to get a grievance form. He first went to the shipping office, and asked the shipping foreman to arrange for a union representative named John McGlinchey to come out to speak to him. The shipping foreman said McCormick would have to speak to someone in the front office. McCormick went there and asked a secretary to call McGlinchey out. She called Whitfield instead, and Whitfield told McCormick he would not send anyone out to see him. McCormick then asked his father, who works in the office, to try and get him a grievance form. It is not entirely clear what happened next, other than that his father did not or could not ultimately bring him a grievance form. Those attempts having failed, McCormick telephoned Wilson later that day and asked for a grievance form. Wilson assumed McCormick wanted the form in order to grieve his discharge the previous August. He told McCormick he was well beyond the time limit for filing a grievance, and asked why he was asking for a grievance form after such a long time. McCormick's response was, "Has everyone gone chickenshit in there? Why won't you give me a grievance form?" Wilson says he then said that McCormick was outside the time limits and he did not know whether he had the right to file a grievance. McCormick claims Wilson said he would try to get him a form "on the sly" and send it to him in the mail. Wilson concedes he may have said he would try to get a form for McCormick.

11. Wilson next contacted Goodison, and asked whether McCormick was entitled to a grievance form. They discussed the time limits in the collective agreement. Goodison advised him that at that time McCormick was no longer an employee or member of the bargaining unit, and would not be entitled to file a grievance. Nevertheless, Wilson went to Whitfield, who maintains a supply of forms for use by the union, and asked for a form. Whitfield asked who it was for. When he was told it was for McCormick, a discussion ensued. Wilson says the discussion ended when Whitfield said he would prefer not to give him a form, and Wilson left it at that. I should say there can be no doubt that Whitfield would have given Wilson the form had he pressed his request after hearing what Whitfield had to say. In not pressing the request, Wilson made his own decision not to give McCormick a grievance form.

12. When he had not heard from Wilson or received a grievance form in the mail, McCormick telephoned Wilson again on January 18th. McCormick's recollection of the conversation is that Wilson said he had spoken to Goodison, who had said McCormick was no longer an employee in the bargaining unit, and that he would not be getting a form. In this respect, McCormick's recollection is not inconsistent with that of Wilson. When his attention was drawn in cross-examination to the references in his complaint to some event in December, 1983, McCormick purported to recall that he had also asked Wilson for a grievance form on a previous occasion in December, 1983, and Wilson had denied him a form at that time, because he was no longer an employee and was, as McCormick recalls it, "way past my limit".

13. I am not called upon to determine whether Mr. McCormick was guilty of the criminal offense with which he was charged or, whether or not criminal liability could be established, of behaviour which constituted just cause for dismissal or any lesser discipline. The focus of this complaint is on the behaviour of the respondent trade union in its representation of



McCormick. McCormick claims the union breached the standard prescribed by section 68 of the *Labour Relations Act*, which provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

He complains that the union decided not to assist him in August, and did so without hearing his side of the story. The events of January, his counsel argues, are evidence that Wilson was not prepared to do anything for McCormick, either then or in August.

14. I find that Russell Wilson at no time refused to assist McCormick with respect to his discharge, either when it was imminent or once it had occurred. In that respect, I do not accept the evidence of McCormick that Wilson said the union would not and could not do anything for him. Having seen and heard McCormick, Wilson, Whitfield, Perrin and MacKay examined and cross-examined, I do not consider McCormick's evidence reliable when it differs from the evidence of any of the other four. Whether from failure of memory or the influence of self-interest, and I need not determine which, McCormick's stated recollection of events was unreliable. I also disbelieve the witness Nicholas, an opponent of the current union executive, who claims Wilson came up to him in the shop on August 8th and, out of the blue, told him that McCormick had been fired for theft, that the union was not prepared to do anything for McCormick and that he was going to tell McCormick to get a good lawyer. On the basis of the evidence of Whitfield, Perrin and MacKay, I find that McCormick did not wish to involve the union in the matter of his alleged theft and consequent dismissal. It was Wilson who approached McCormick; McCormick did not, in fact, ask Wilson or any other union representative to do anything for him in August, 1983. If that was because McCormick thought the union *could not* do anything for him, that was because he had so concluded, and not because Wilson had so stated. Wilson did tell McCormick the case would be difficult. Based on what he then knew and on what McCormick had been able or willing to tell him on the telephone, that does not seem an unreasonable assessment. Wilson specifically invited McCormick to come and discuss the case further, and to initiate the grievance procedure. He discussed with McCormick the time limits for filing a grievance. Indeed, McCormick knew about the time limits, having served a term on the grievance committee as a steward.

15. What more should Wilson have done? Counsel for McCormick says Wilson should have made an effort to initiate further contact, that he should not have let the matter go without having a personal meeting with McCormick, that he should have found out whether McCormick was really aware of his rights or wanted to pursue them. However, there is no suggestion in the evidence that McCormick was unaware of any rights he might have had, or that there was any reason for Wilson to suppose his message had not gotten through to McCormick. Indeed, it might be a matter of debate whether Wilson was obliged to take as active a role as he did. In any event, a trade union's duty certainly does not require it to foment grievances on behalf of reluctant grievors. In that regard, I would adopt the following conclusion of the British Columbia Labour Relations board in *Charles F. Morgan*, [1982] 1 Can LRBR 104 at p.111:

We reject the proposition that when a union learns that an employer has taken action against an employee — even if that action is dismissal from employment — the union is always under a duty to take action in the absence of a complaint from the employee.

Whether there are circumstances in which a trade union comes under a duty to take action

on a potential individual grievance in the absence of a request from the potential grievor is a question which need not be considered here. In the circumstances of this case, it cannot be said that Wilson's conduct in August was arbitrary, and as it was not suggested that it was either discriminatory or in bad faith, it follows that there was no violation of section 68 in August, 1983.

16. Counsel for McCormick argues that Wilson acted arbitrarily in January, 1984, by not seeking an extension of the time for filing a grievance of McCormick's August, 1983, discharge. The proposition that he could or should have sought an extension was not put to Wilson in cross-examination, so he did not have an opportunity to respond to it and I do not have the benefit of his response in assessing this submission. When McCormick called Wilson on January 11th and made what I find was McCormick's first request for a grievance form, Wilson asked him why he was seeking a grievance form after such a long time. McCormick offered no explanation for the delay, nor did he request that the union take whatever steps it could in order to process a grievance which he knew was untimely in the extreme. That might have been Wilson's answer to the submission, had it been put to him. He might also have said whether he and Goodison discussed the possibility of seeking an extension. As it was not put to Wilson, I cannot assume against his interest and that of the union that he did not consider it and conclude that, in all the circumstances, and particularly in the absence of any explanation by McCormick for the delay, that it was unlikely in the extreme either that an arbitrator would exercise the power under subsection 44(6) of the *Labour Relations Act* to extent the time limit for filing the grievance or that the company would agree to waive or extend that time limit. Section 68 does not oblige a trade union to take extreme or indefensible positions. In these circumstances, I cannot find that the union acted in an arbitrary manner in not seeking an extension even assuming, without deciding, that it was obliged to consider doing so in the absence either of a request that it do so or an answer to its question about the reasons for the delay.

17. I had some concern when I heard his evidence that Wilson might have clouded the issue in the January 18th conversation by suggesting to McCormick that he was not sending a form because the company had refused him one. That was not why Wilson had not sent and would not send McCormick a grievance form. It is inappropriate for a trade union to mislead a grievor about the actions it has taken on his behalf and the reasons for them. Trade union prevarication can violate section 68, particularly if the complainant is prejudiced by being unable to respond to unexpressed concerns of which he is left unaware: see *United Brotherhood of Carpenters and Joiners of America and Local Union 2737*, [1980] OLRB Rep. July 1102. On further consideration, however, I am satisfied that McCormick was not mislead or prejudiced in that way. It is clear from the text of the complaint he filed and from the evidence he gave that in January, 1984, McCormick understood that the union would not then process a grievance on his behalf because of his extreme delay in raising the matter.

18. I was also concerned about Goodison's advice to Wilson that McCormick was no longer an employee, as it seems that may, in turn, have formed part of the Wilson's explanation to McCormick. In a narrow sense, McCormick ceased to be an employee the day he was fired. It is clear that the respondent's duty to him did not come to an end at that point in time nor, obviously, is that what Goodison and Wilson either thought or meant. They were clearly focusing on the circumstances of McCormick's case: the failure to file a grievance or seek the union's assistance in August, 1983, and the unexplained delay in doing either thereafter. Their instincts were right; the language they used to describe their conclusion lacked some precision. Having regard to sub-section 1(2) of the Act, a dismissed employee remains an employee for

the purpose of the Act, and therefore for the purpose of section 68, if the dismissal is contrary to the provisions of a collective agreement. Because that is the very issue which would be addressed in arbitration if arbitration were not precluded by the delay, it would have been more accurate to say that by his inaction and unexplained delay, McCormick had lost any opportunity to assert that he was still an employee. Again, however, McCormick knew exactly why the union would do nothing for him in January, 1984. He was not misled or prejudiced by any inelegance in its explanation to him of his legal position. He clearly understood from all Wilson said that his delay was the reason he was not being given a grievance form.

19. Taken in context and as a whole, Wilson's response to McCormick's calls in January, 1984, did not breach the union's duty under section 68.

20. In the result, a breach of section 68 has not been established. This complaint is, therefore, dismissed.

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**2511-84-R** George Mihailidis, Applicant, v. Canadian Union of Operating Engineers & General Workers Local 101, Respondent, v. **Midmetro Plastics Limited**, Intervener

**Practice and Procedure — Termination — Union inactive for two years since certification — Not responding to inquiries by employer or conciliation officer — Ongoing conciliation nevertheless making termination application untimely**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members C. A. Ballentine and F. W. Murray.

**APPEARANCES:** *George Mihailidis on his own behalf; no one for the respondent; John Cautius and Trudy Scherer for the intervener.*

**DECISION OF THE BOARD; February 5, 1985**

1. This is an application for termination of the respondent's bargaining rights made pursuant to section 57 of the *Labour Relations Act*. A hearing in this matter was held in Toronto on January 31, 1985. No one appeared for the respondent union.

2. The facts are not in dispute. In September, 1982, the union was certified to represent the employees of the intervener, Midmetro Plastics Limited. Notice to bargain was given, and some bargaining took place, but it was inconclusive. On February 18, 1983, the Minister appointed a conciliation officer to meet with the parties and assist them to make a collective agreement. There were two meetings: March 2, 1983 and April 12, 1983. There was no collective agreement reached.

3. Nothing happened for almost a year. The union did not try to contact the employer to renew negotiations, nor, it seems, did it have any contact with the employees. In February, 1984, on its own initiative, the employer sent the union a new counter-offer. There was no union



response. In April and May of 1984, the employer contacted the conciliation officer and was told that he had been unable to get any response from the union and assumed, therefore, that it had no continued interest in representing the employees. The applicant told the Board that he was unaware of any union activity since the months immediately following the union's certification. So far as he was aware, there have been no meetings or other contact with the employees for almost two years. He concluded, not unreasonably, that the union was no longer interested in representing the employees. That is why he brings the present application.

4. The only recent indication from the union is its letter filed in response to this application. In the letter, the union takes the position that the parties are still in conciliation (which is technically correct) and points to section 61(1)(b) of the Act which reads as follows:

Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

• • •

(b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

This letter is dated December 13, 1984. In the six weeks between drafting this letter and the date of hearing, the union made no effort to contact the employer or the employees.

5. We are troubled by the facts in this case and the technical basis upon which the application is being resisted. It is difficult to understand why a responsible trade union would effectively abandon a group of employees then resist their effort to terminate bargaining rights which have not been actively asserted. Indeed, it is the union's very inaction which, it seems, led the employer and the conciliation officer to believe that the union was no longer interested in representing the employees. It is difficult to envisage any other practical motivation but to frustrate its former supporters and delay the inevitable. But the union is right: until the conciliation process is formerly completed by the issuance of a no-board report and thirty days have gone by, no application for termination can be made.

6. For the foregoing reasons, then, this application must be dismissed. We wish to make it clear, however, that the dismissal is without prejudice to the right of the employer (under section 59) or the employees (under section 57) to make a later application when the timeliness requirements have been met.

#### **CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE;**

I agree with my colleagues that this application must be dismissed. However, it is clear that the union has not made any effort to represent these employees for almost two years. In my view, it should do the responsible and honourable thing: surrender its certificate.

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**2619-84-U; 2620-84-R** Graphic Communications International Union, Local 500-M, Complainant, v. **Mundet Industries Ltd.**, Respondent

**Certification — Practice and Procedure — Settlement — Unfair Labour Practice — Union relying on unlawful employer conduct in seeking certification without vote — Parties entering into settlement — Board accepting agreement to treat application as pre-hearing application — Authorizing notice to employees agreed to by parties**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

**DECISION OF THE BOARD;** February 5, 1985

1. This is an application for certification which was scheduled for hearing together with an unfair labour practice complaint involving the same parties. The hearing was to begin on January 31, 1985, and continue on the following day and such further days as might be scheduled. However, on January 31, 1985, the parties met with a Labour Relations Officer and after protracted discussions were able to reach an amicable resolution of all matters in dispute between them. We might note that although notice of the certification application was posted, in Form 6, in conspicuous places where it would most likely come to the attention of employees affected by the application, no employees have filed any written statement in opposition to the application, nor did any employee objectors appear on January 31, 1985, when the matter was scheduled to come on for a hearing.

2. It is unnecessary to set out the details of the parties' settlement, save to note that it was a comprehensive one, including the terms for an agreed notice to employees attached hereto as Appendix "A". It suffices to say that both parties were in agreement that this application should properly be treated with all necessary amendments as a "pre-hearing" application for certification. The Board sees no reason why it should not accept the parties' agreement in this regard.

3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

4. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent in Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office, sales and clerical staff, and persons regularly employed for not more than 24 hours per week.

While described as a "voting constituency" in accordance with the required practice for pre-hearing certification votes, the Board notes the parties' agreement that this description would also define the unit of employees appropriate for collective bargaining.

5. All employees of the respondent in the voting constituency on January 16, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between the 16th of January, 1985, and the date the vote is taken will be eligible to vote.
  6. Voters will be asked to indicate whether they wish to be represented by the applicant union in their employment relations with the respondent.
  7. The parties were not in agreement on whether Kevin Norris and Hermant Singh were properly included in the voting constituency and entitled to vote. The employer's position is that both of these individuals exercise managerial functions within the meaning of section 1(3)(b) of the Act, and, therefore, cannot be included in the voting constituency or any bargaining unit. The union takes the position that neither individual exercises managerial functions. Accordingly, the Board notes that, in the event that either Kevin Norris or Hermant Singh present themselves at the polling station they shall receive and be entitled to cast segregated ballots.
  8. The parties have agreed on voting arrangements which, again, need not be set out in detail here.
  9. The matter is referred to the Registrar.
  10. In view of the above-mentioned settlement, leave is hereby given to the union to withdraw its section 89 complaint (Board File No. 2619-84-U) and its request for certification pursuant to section 8 of the *Labour Relations Act*.
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The Labour Relations Act

# NOTICE TO EMPLOYEE

Posted by AUTHORITY of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN ACCORDANCE WITH AN AGREEMENT  
REACHED BETWEEN THE UNION AND THE COMPANY.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES.

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL  
ACTIVITIES OF A TRADE UNION.

TO ACT TOGETHER FOR COLLECTIVE BARGAINING.

TO REFUSE TO DO ANY AND ALL OF THESE THINGS,  
IF THEY WISH.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT  
INTERFERES WITH THESE RIGHTS.

THE LABOUR RELATIONS BOARD HAS DIRECTED THAT A  
REPRESENTATION VOTE BE HELD AMONG THE EMPLOYEES  
SOUGHT TO BE REPRESENTED BY LOCAL 500-M. PRIOR  
TO THE TAKING OF THE VOTE WE WILL ENSURE THAT  
REPRESENTATIVES OF THE UNION WILL BE ABLE TO  
MEET WITH EMPLOYEES DURING WORKING HOURS, IN THE  
ABSENCE OF MANAGEMENT, WITHOUT LOSS OF PAY.

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MUNDET INDUSTRIES LTD.

This is an official notice of the Board and must not be removed or defaced

**1893-84-U** Canadian Union of Public Employees — C.L.C., Ontario Hydro Employees Union, Local 1,000, Complainant, v. **Ontario Hydro**, Electrical Power Systems Construction Association, International Brotherhood of Electrical Workers, Labourers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, International Association of Bridge, Structural and Ornamental Ironworkers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Association of Heat and Frost Insulators and Asbestos Workers, United Brotherhood of Carpenters and Joiners of America, Operative Plasterers and Cement Masons International Association, International Union of Operating Engineers, International Brotherhood of Painters and Allied Trades, Sheet Metal Workers International Association, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and International Brotherhood of Bricklayers and Allied Craftmen, Respondents

**Interference in Trade Unions — Intimidation and Coercion — Practice and Procedure — Trade union — Unfair Labour Practice — Trade unions not “persons” and not capable of violating sections 64 and 66 — Whether prohibition against more than one collective agreement breached — Whether prohibition against more than one collective agreement breached — Whether bargaining with unions other than bargaining agent — Section 70 violated only where coercive conduct coupled with demand to refrain from exercising statutory rights — Whether employer support for union proper subject of unfair labour practice proceeding**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members R. McMurdo and W. F. Rutherford.

**APPEARANCES:** *S. T. Goudge and G. Holland for the complainant; Harvey Beresford, Barry Brown, W. S. O'Neill, Vello Medrie and Brian Story for Ontario Hydro and the Electrical Power Systems Construction Association; A. M. Minsky, Q.C. and William Warchow for the respondent trade unions.*

#### **DECISION OF THE BOARD; February 21, 1985**

1. The complainant has complained that all employees in the bargaining unit represented by the complainant at Pickering Generation Station (the “station”) and all employees in the complainant’s bargaining unit who have been declared surplus by Ontario Hydro have been dealt with contrary to the provisions of sections 48, 49, 64, 66, 67 and 70 of the *Labour Relations Act* and has requested certain relief. The complaint arises in connection with the work of retubing nuclear reactor units at the station and other work respecting the nuclear plant at that station. It is the position of the complainant that on or about October 2, 1984, Ontario Hydro informed the chief stewards of the complainant that effective October 4, 1984, the work referred to earlier would be performed at the station under the terms and conditions of Maintenance Assist Agreements between the Electrical Power Systems Construction Association (“EPSCA”) of which Ontario Hydro is the dominant member and several construction trade unions.

2. It is the position of the complainant that prior to October 4, 1984, all maintenance work on nuclear generating units had been performed by members of the complainant in accordance with the terms and conditions of the collective agreement between the complainant and Ontario Hydro. The complainant alleges that at all material times it had sixty-seven surplus employees, all of whom were capable of performing some of the work involved in the retubing of nuclear reactors at the station and other maintenance work respecting the nuclear plant.

3. At the commencement of the hearing on February 14, 1985, counsel for the respondent trade unions made a motion to dismiss the complaint against the respondent trade unions. At this point counsel for the complainant informed the Board that he was instructed to withdraw the request for relief under section 60. Having regard to the stage at which the withdrawal was made, the Board dismissed the complaint in so far as it related to section 60. The Board entertained submissions on the motion to dismiss this complaint with respect to the remaining sections 48, 49, 66, 67 and 70 of the *Labour Relations Act*.

4. With respect to section 49, the thrust of the allegations of the complainant is that the collective agreement or collective agreements between Ontario Hydro and EPSCA on the one hand and the respondent trade unions has or have duplicated the collective agreement between the complainant and Ontario Hydro. Section 49 states:

There shall be only one collective agreement at a time between a trade union or council of trade unions and an employer or an employers' organization with respect to the employees in the bargaining unit defined in the collective agreement.

A plain reading of section 49 supports the motion before the Board. The section uses the words "a trade union or council of trade unions and an employer or an employers' organization with respect to the employees in the bargaining unit defined in the collective agreement". The *Labour Relations Act* is grounded on the principle of exclusive bargaining rights rather than the concept of proportional bargaining rights. The use of the indefinite article in section 49 is in conformity with the principle of exclusive bargaining rights and, in our view, refers to the collective bargaining relationship between one trade union or one council of trade unions and one employer or one employers' organization. If the Legislature had intended section 49 to apply to more than one trade union or council of trade unions it would have used, in our opinion, "any" rather than the indefinite article and referred to any trade union or any council of trade unions. The purpose of section 49 is to declare that there may be only one collective agreement at a time with respect to the employees in the bargaining unit defined in the collective agreement. Section 49 addresses and clarifies the relationship between a collective agreement and other agreements between a trade union and an employer which may fall within the definition of a collective agreement in section 1(1)(e) as respecting terms or conditions of employment or rights, privileges or duties of a trade union or an employer. Such other agreements may be for different periods of operation and may refer to such matters as health, welfare and pensions. Section 49 also addresses the situation where there is a master agreement between a trade union and an employer and also local agreements with respect to various locations of the employer. In these instances section 49 makes it clear that there may be only one collective agreement. Other documents may constitute a part of one collective agreement or may be separate, apart and in no sense a collective agreement. The complaint in so far as it relates to section 49 is dismissed because section 49 has no application to the alleged facts before the Board.

5. Sections 64 and 66 of the Act state:



64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

These two sections commence with the words "No employer or employers' organization and no person acting on behalf of an employer or an employers' organization . . .". The respondent trade unions are neither employers nor an employers' organization. Are any of the respondent trade unions "persons" within the meaning of sections 64 and 66? In *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597, the Board considered the word "person" as used in the unfair practices portion of the Act. At page 600 the Board stated:

There remains for consideration whether the complainant as a trade union has been compelled to refrain from exercising any other rights under the Act or from performing any obligations under the Act as contemplated by section 61 [now section 70]. The word "trade union" is set forth in the first line of section 61 [now section 70] and the compulsion is envisaged with respect to any person. It is now well established in the Board's jurisprudence that a trade union is not a person for the purpose of interpreting The Labour Relations Act. In this regard see, for example, the *Rapid Typesetting Company Limited* case, [1969] OLRB Rep. Oct. 875; and the *De Vilbiss (Canada) Limited* case, [1976] OLRB Rep. March 49.

6. It follows that since the respondent trade unions are neither employers nor an employers' organization nor a person, the respondent trade unions are not capable of violating sections 64 and 66. This complaint is therefore dismissed against the respondent trade unions in so far as it relates to sections 64 and 66.

7. Section 67 states:

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

Section 67(1) refers to "No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall . . .". The Board's remarks with respect to sections 64 and 66 also apply to section 67(1). Section 67(2) does state an offence which a trade union, council of trade unions or a person acting on behalf of a trade union or council of trade unions may commit. The Board has considered the complaint, the exhibits filed in evidence by the parties and the opening statement by counsel for the complainant. It appears to the Board that the agreements which are referred to as collective agreements and to which the respondent trade unions are parties are neither intended to be binding on members of the complainant nor are the respondent trade unions attempting to represent employees in the bargaining unit represented by the complainant. In our opinion the complainant and the respondent trade unions are confronting each other over a perceived overlap in work jurisdiction and not with respect to bargaining rights. The Board has previously considered complaints under what is now section 89 of the Act with respect to section 67 (formerly section 59). In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board stated at page 1034:

Nor can it be said that the subcontracting clause interferes with another union's bargaining rights contrary to sections 56 [now section 64] and 59 [now section 67] of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the Labour Relations Act, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 [now section 64] and 59 [now section 67] of the Act are intended to protect bargaining rights only and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 [now section 91] of the Act for the resolution of jurisdictional disputes.

The Board dismissed the complaints with respect to the sections referred to in the quotation and several other sections of the Act.

8. In *Toronto Star Newspapers Limited* [1979] OLRB Rep. May 451, the Board also considered whether work jurisdiction and bargaining rights are synonymous and the relative place of jurisdictional disputes and stated at page 456:

While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some

degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81 [now section 91].

and again at page 457:

The Board is convinced that this complaint is nothing more than a latent jurisdictional dispute. It is clear to us that the complainant, by framing its argument in terms of a derogation of bargaining rights, is attempting to assert an absolute claim to the work in question. If the Board were to grant the remedy requested by the complainant, it would have the effect of preventing the respondent union from making any claim to the work in question. Even if Local 35-P has the better claim to the work in question, and we make no finding in this regard, such a claim should be asserted through the jurisdictional dispute provisions under section 81 of the Act, and not by means of an unfair labour practice complaint.

The Board dismissed the complaint under section 79 [now section 89] with respect to offences alleged under, *inter alia*, sections 56 [now section 64] and 59 [now section 67]. There is nothing in the material before the Board which alleges a violation of section 67 and the complaint is dismissed in so far as it relates to section 67.

9. Section 70 states:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Counsel for the respondent trade unions previously requested particulars with respect to the alleged violation of section 70. None were provided either prior to or during the hearing on February 14, 1985. The Board is of the opinion that the respondent trade unions are hampered in the preparation of their case by allegations which are indefinite and incomplete. In these circumstances, the Board strikes the allegations with respect to section 70 from the complaint pursuant to section 72(3) of the Board's Rules of Procedure. However, the allegations with respect to section 70 are also dismissed on an additional ground. Section 70 refers to the acts of intimidation and coercion in order to compel persons to refrain from exercising rights under the Act. The Board has previously held that in order for intimidation or coercion to be established in section 70 there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person refrain from exercising a right under the Act or from performing an obligation under the Act. See *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219. The allegations before the Board do not even remotely suggest such conduct.

10. Section 48 states:

An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or



- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

The complainant seeks to set aside the Maintenance Assist Agreement or Agreements entered into by the respondent trade unions. It is the position of the complainant that at the time the Maintenance Assist Agreement was entered into the respondent trade unions were not entitled to represent any employees in the bargaining unit contained therein and entered into the collective agreement with the support of Ontario Hydro. The complainant is apparently referring to section 48(a) rather than section 48(b). Section 48 deems certain agreements not to be collective agreements for the purposes of the Act. Counsel for the complainant was unable to refer the Board to any examples where the Board had entertained a complaint under section 89 with respect to section 48. Typically, issues with respect to section 48 arise in representation proceedings where one trade union is seeking to displace another trade union as the bargaining agent of a given group of employees. In a proceeding which involves the provisions of section 48, the trade union which challenges the collective agreement has established its interest in representing the employees who are covered by the impugned collective agreement. In the instant complaint the complainant is in essence not seeking to represent the workers who are claimed to be represented by the respondent trade unions. Rather, the complainant is seeking to secure the work performed by these workers for its own members who are covered by its collective agreement with Ontario Hydro. The complainant is a stranger to the representational issue involved in the Maintenance Assist Agreement or Agreements and may not use the complaint procedure under section 89 to convert a jurisdictional issue into a representational issue. The complaint in so far as it relates to section 48 is dismissed.

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**2390-84-U Rudy Piluso, Complainant, v. Executive Committee of United Brotherhood of Carpenters and Joiners of America Local 38, Respondent**

**Duty of Fair Referral — Practice and Procedure — Unfair Labour Practice — Members breaching hiring by-law by accepting work directly from employers — Union not imposing full measure of punishment under by-laws — Whether arbitrary — Board noting union's undertaking to remedy wide-scale breaches of hiring hall rules on record — Dismissing complaint**

**BEFORE:** M. G. Mitchnick, Vice-Chairman.

**APPEARANCES:** *John DiFiore and Rudy Piluso for the complainant; David McKee, Fern Fulham and Doug Putman for the respondent.*

**DECISION OF THE BOARD;** February 1, 1985

1. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the complainant has been dealt with by his trade union contrary to the provisions of section 69 of the Act. Section 69 provides:

“Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.”

The essence of this complaint is that the hiring rules of the Local were strictly applied to the complainant but not to other members of the Local. In particular, the complainant complains that when violations of the hiring rules *were* brought to the attention of the Local Executive, no effort was made to exact the full measure of punishment provided under the Local's by-laws, being the removal of the offending employee from the job. Following receipt of the evidence and the submissions of the parties, the Board issued orally its reasons for dismissing the complaint.

2. The Board is readily satisfied on the evidence that, whatever else might be said with respect to the decisions of the trade union's officers to act, or not to act, with respect to the enforcement of the Hiring Hall rules, none of those decisions were taken for the purpose of benefiting specific individuals over the complainant, or causing the complainant to suffer loss. The facts as they have evolved, however, have produced a situation of inequity, particularly for the complainant as one individual, and accordingly, it is important that the Board be satisfied that the respondent, however much good faith may have accompanied its actions, did not act in a manner that was “arbitrary”, within the meaning of section 69.

3. It is important to note at the outset that the case essentially involves a *failure* to act, on the part of the respondent trade union, that is, a failure to take all of the steps available to it to enforce certain rules set out in its by-laws with respect to the hiring of its members. There are, apart from this question, only two cases cited before the Board of the deliberate issuance of a referral slip by responsible officers of the respondent, in circumstances that arguably might not have justified it. One such case was in respect of Mr. Bell, but I do not find on the evidence that the understanding that he was engaged previously in industrial, commercial and institutional work, as opposed to what in fact turned out to be part of the N.E.E.D. program, was so implausible or obviously incorrect as to support an inference of arbitrariness on the part of the trade union, when it authorized the issuance of a referral slip

for Mr. Bell's recall. The other case is the deliberate decision to treat the last day that Mr. Bert Loiselle was paid but did not work because of an injury not to be "hours worked" for the purpose of the 60-hour rule. That interpretation of the rule was at least "arguable", and given the compassionate circumstances surrounding Mr. Loiselle's case, we do not find the union executive to have acted in an arbitrary manner in this instance either. As Mr. Loiselle is a distant cousin of the President, Mr. Fulham, Mr. Fulham might have been better advised to leave the discussion of Mr. Loiselle's case to someone else. But time was of the essence, as the company wished its requisition to be filled immediately, and I find Mr. Fulham's handling of the matter to have been, if anything, a political error in judgment, rather than an indication of a violation of the Act. There is no question but that Mr. Piluso acted properly in raising the legality of his accepting on his own the job of "foreman" with Piggott Construction in June, and that Mr. Fulham acted properly in advising Mr. Piluso that the unemployed list had to be followed. The only question is whether the subsequent assignment of Mr. Loiselle to that job was a deliberate violation of the rules, in contrast to the response given to Mr. Piluso, and I find that it was not.

4. As indicated, the problem raised with respect to the union's conduct was its failure to initiate the steps necessary to enforce the hiring by-law in full, and in that context I find it critical to recognize that the situation which Mr. Fulham was faced with was not a fresh one. Rather, I am satisfied from the evidence that the wide scale breach of the hiring by-laws, by members obtaining work from contractors on their own and not informing the union at all, had been going on for some time. I am also satisfied from the evidence that the members of the executive, and not just Mr. Piluso, demonstrated a concern over the existence of such "cheating". I note, for example, that Mr. Piluso and others were authorized to incur expenses on behalf of the local union in seeking to verify the names of members currently engaging in such improper conduct. Given the difficulties in tracking such employees, and the numbers involved, together with the number of potential "defences" to a charge which the union was required to investigate, I do not find the delay in the matter being brought to a head to have been unreasonable in this case. Nor do I find the grounds upon which Mr. Fulham and the other members of the executive present at the final executive meeting decided to exact only the \$10.00 fine provided for under the by-laws, and to issue each violator, and each contractor involved, a letter of warning, to be so unreasonable as to support a charge of arbitrariness. Again, the longstanding nature of the practice was a critical consideration, and I find that Mr. Fulham was not unreasonable in his concern, apart from the time and cost of investigating each circumstance, that he might be faced with a kind of "estoppel" argument from both employers and employees alike in seeking to grieve or exact the full penalty under the by-laws without any form of advance notice. The evidence also is that any employee who is caught and has to be warned twice for such violation of the by-laws becomes subject to having his membership removed from him. In light of that evidence, I do not find the decision to fine the member and issue a warning letter, rather than remove the offending member from the job, to have been simply a frivolous gesture. Rather, I find it to have been within the bounds of reason for the trade union to have stopped short of seeking to exact the full penalties available under the by-laws, on the very first occasion on which it was taking significant steps to rectify the current practice. I would feel more comfortable with that final decision had it been deferred until a meeting at which Mr. Piluso, whose interest in the matter had been obviously demonstrated, could have been in attendance, but I do not find that the holding of the meeting without him was done deliberately, and his views were well known and not likely to have added a significantly different element to those factors upon which a quorum of the executive unanimously made their decision. My real concern is that the hiring system be made to apply and work uniformly as quickly as possible into the future, so as to insure that the good, honest men, like the



complainant Mr. Piluso, and like the President, Mr. Fulham himself (who also turned down a job improperly offered by a contractor) are not the ones who suffer. For that reason I have been troubled by the possibility of the present "transition" period being allowed to continue without any fixed termination point.

5. My concern has, however, been satisfied by the undertaking given by the respondent to the Board at the conclusion of closing argument, and I now note that undertaking fully on the record. The respondent trade union undertook:

- 1) to instruct its counsel to draft a letter to be sent to all members of Local 38 in connection with the abuse of the hiring rules;
- 2) to send a similar letter of warning to all local contractors and any contractor who has made remittances to the administrator of the union's trust fund within the past three years;
- 3) to exact the full penalty for any violation of section 28 of the by-laws (the Hiring Rules) except as modified by any collective agreement to which the local is a party, or any duly enacted motion at a membership meeting; and
- 4) to file a grievance and if necessary proceed to arbitration for a violation of the hiring provisions in any collective agreement to which Local 38 is a party.

With respect to the two letters referred to in paragraphs 1 and 2 above, the respondent undertook to submit its proposed text for those letters to the complainant's counsel for approval, and failing such approval, to allow this matter to be reopened so that the Board may resolve any dispute over the text of the letters.

6. On the basis of the foregoing, the complaint is dismissed.

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**1147-84-R Ontario Nurses' Association, Applicant, v. Rainy River Valley Health Care Facilities, Inc., Respondent**

**Practice and Procedure — Representation Vote — Union and employer agreeing to vote arrangements — Wrongly assuming all employees available — Employer not consenting to union's request to reschedule vote — Two of three employees not having opportunity to vote — Vote set aside and new vote directed**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. Wilson.

**APPEARANCES:** *Marilyn Nairn and Linda Gosselin for the applicant; Frederick J. W. Bickford for the respondent.*

**DECISION OF THE BOARD;** February 5, 1985

1. This is an application for certification which was filed on July 31, 1984, and the application was initially heard by the Board on August 17, 1984. In a decision in this matter dated August 17, 1984, the Board stated, in part:

4. Having regard to the agreement of the parties, the Board further finds that the following constitutes units of employees of the respondent appropriate for collective bargaining:

all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator, and those persons regularly employed for not more than 24 hours per week ("bargaining unit #1);

all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator, and those persons regularly employed for more than 24 hours per week ("bargaining unit #2").

Having regard to those bargaining unit descriptions, counsel for the respondent sought to resile from the agreed upon descriptions after the membership count had been announced. However, for reasons given orally at the hearing of this matter, the Board declined to permit him to do so and held that the respondent was bound by that agreement.

2. In the same decision the Board issued a certificate with respect to bargaining unit #2 and directed a representation vote with respect to bargaining unit #1. A representation vote was conducted by the Board in Rainy River on September 11, 1984. None of the three eligible voters cast ballots in the representation vote. The applicant has requested that a second representation vote be held. The respondent has opposed the request that a new representation vote be held and has taken the position that the application for certification with respect to bargaining unit #1 be dismissed. In order to understand the positions of the parties, it is necessary to trace the incidents which culminated in no one casting a ballot on September 11, 1984.

3. At the hearing in Toronto on August 17, 1984, the parties met with a Labour Relations Officer and at the request of the respondent two bargaining units were defined. The respondent was represented by solicitors in Thunder Bay. On August 17, 1984, these solicitors were represented by an agent in Toronto. The applicant was represented by Dan Anderson, its acting director of labour relations. The agent, after consulting directly with the respondent, agreed

to the inclusion of Denise Johnson in bargaining unit #2. The agent then received a telephone call from the solicitors in Thunder Bay who instructed him not to agree to the inclusion of Denise Johnson in bargaining unit #2. The agent endeavoured to act upon these instructions. However, as pointed out in paragraph one herein, the Board did not permit the agent to reverse himself on his previous agreement.

4. At the meeting before the Labour Relations Officer, the applicant discovered to its surprise that due to the absence from work of one of the full-time employees on a maternity leave it was only in a vote position with respect to bargaining unit #1. Most of the attention of the parties on August 17 was directed towards the agreement/dispute with respect to the inclusion or exclusion of Denise Johnson and only minor attention was apparently given to the contemplated representation vote. The Labour Relations Officer made the arrangements for the representation vote in Rainy River and on behalf of the Board suggested August 29 and September 6 as alternative dates. On August 17, the agent agreed on behalf of the respondent to the vote arrangements and on the same date Mr. Anderson telephoned Thunder Bay to check with Linda Gosselin, who is the applicant's employment relations officer in Thunder Bay, on the vote arrangements. Mrs. Gosselin who was responsible for organizing the employees who are affected by this application was not in her office due to illness. Mr. Anderson's telephone call was answered by Evelyn Burke also one of the applicant's employment relations officers who, in turn, telephoned Mrs. Gosselin at her home about the arrangements for the representation vote. Mrs. Gosselin informed Ms. Burke that a matter previously scheduled for September 6 could be moved and that Mrs. Gosselin was available on both dates for the representation vote. In a subsequent telephone conversation, Ms. Burke notified Mr. Anderson that these dates were available for Mrs. Gosselin. Mr. Anderson then informed the Labour Relations Officer that these dates for a representation vote in Rainy River were acceptable to the applicant.

5. On August 20, the Board received a telegram from the solicitors in Thunder Bay in which they objected to the inclusion of Anne MacInnes on the voters' list on the grounds that she had left work on maternity leave on June 15 and had designated by letter that she would not return until October 15. The applicant was made aware of this objection. Subsequently, the parties were advised by the Board that the representation vote would be conducted on September 11, 1984. The solicitors for the respondent advised the Board by telephone on September 7 that the respondent was withdrawing its objection to the eligibility of Mrs. MacInnes.

6. On August 17, it appeared that three employees were eligible to cast ballots in the representation vote. The names of these three persons are:

Rosemary Crawford  
Ruthilia Noval  
Anne MacInnes.

The Board conducted the representation vote on September 11, 1984, and none of these three employees cast ballots. Of the three employees only Ruthilia Noval was present in Rainy River on September 11. She was working on the respondent's premises on that date and was aware that a representation vote was being conducted. Ms. Noval did not cast a ballot in the representation vote. Ms. Crawford and Mrs. MacInnes were not in Rainy River on September 11, 1984. An understanding of their absences from Rainy River, the knowledge of their absences and the attempts to accommodate such absences is necessary in order to understand the positions of the parties.



7. Ms. Crawford, by arrangement with the respondent, left Rainy River on or about August 31, 1984, in order to spend one month's vacation in Europe. Her plans were well known to the respondent due to the fact that she used one week of her vacation in March to spend time with her father who was ill. On her return to Rainy River, she was permitted to work extra shifts so that she would be entitled to take one month's vacation in Europe.

8. Mrs. MacInnes commenced her maternity leave on June 15, 1984, and her estimated date of return was October 15, 1984. She gave birth during the summer and between August 13 and 17 attended at the respondent's premises in Rainy River to speak to Norma Elliott, the director of services, in order to clarify the relationship between her maternity leave and her vacation. Mrs. Elliott was busy and while Mrs. MacInnes was waiting to see Mrs. Elliott she spoke to Rebecca Brown, a member of bargaining unit #2 and the applicant's contact person in Rainy River. Mrs. MacInnes informed Mrs. Brown that she and her infant were flying to Eastern Ontario for twenty-nine days on September 1, 1984.

9. For these reasons, Ms. Crawford and Mrs. MacInnes were absent from Rainy River on September 6 and 11, 1984. At the time when Mrs. Gosselin informed Mr. Anderson through Ms. Burke that she was available for a vote for August 29 and September 6, she clearly had not addressed the issue of the availability of the three full-time employees to cast ballots in a representation vote. It appears that initially she assumed that because she was available these three employees would also be available.

10. Mrs. Gosselin had been instrumental in organizing the respondent's employees in May of 1984. At that time, she observed that Mrs. MacInnes was pregnant. When Mrs. Gosselin returned to her office in Thunder Bay after her illness on August 20, 1984, she telephoned Mr. Anderson and confirmed that the dates for the representation vote were August 29 or September 6. On August 22 or 23, she received a telephone call from the Board and was informed that the date for the representation vote had been changed to September 11. Mrs. Gosselin queried why the date had been changed. The caller did not know and asked if the applicant could be there. Mrs. Gosselin checked her calendar and informed the caller that the applicant would be in Rainy River for the representation vote on September 11.

11. Between August 20 and the beginning of September, Mrs. Gosselin unsuccessfully attempted to contact Mrs. Brown about the representation vote. Unknown to Mrs. Gosselin, Mrs. Brown was on vacation. On September 4 or 5, Mrs. Brown tried to contact Mrs. Gosselin and left a telephone message that there was a problem with the representation vote. The next day Mrs. Gosselin returned the telephone call and was told that two of the three eligible voters would not be present at Rainy River on September 11. On September 6, Mrs. Gosselin telephoned Mr. Anderson and informed him of the state of affairs. He advised her to telephone the Registrar of the Board. Before telephoning the Registrar she telephoned Bryan Redford, the respondent's personnel director at Fort Frances. Mrs. Gosselin informed him that she had recently discovered that two of the three members of the full-time bargaining unit would not be in Rainy River on the date of the vote. She expressed the opinion that it would not be a fair representation of the wishes of the majority of the full-time employees if two out of three of them were not in Rainy River at the time of the representation vote. Mr. Redford agreed that it would be unfair and Mrs. Gosselin was left with the impression that Mr. Redford was agreeing to postponing the date of the representation vote. She informed Mr. Redford that she would telephone the Registrar and he replied that she should let him know what was the position of the Board.

12. Mrs. Gosselin telephoned the Registrar on September 6 and was unable to reach him. The Registrar was in a meeting and she was unable to speak to him. She left a message with a receptionist and was told that the Registrar would return her call. During the morning of September 7, Mrs. Gosselin had not heard from the Registrar and she again telephoned the Board. She was told that the Registrar was at another meeting. Mrs. Gosselin asked if there was an assistant she could talk to and was connected to a person in the vote section. Mrs. Gosselin explained the problem and was then told that she would have to get in touch with the respondent and agree on another date. She then telephoned Mr. Redford during the afternoon of September 7 and was told that he had gone for the day and the weekend. She asked to speak to Ken White, the executive director of the respondent, and was told that he also had gone for the day and the weekend. Further inquiries by Mrs. Gosselin elicited the information that their secretaries had also gone for the day and the weekend and that only the receptionist was on duty. Mrs. Gosselin left a message and asked that Mr. Redford receive it first thing on Monday morning, September 10.

13. Mrs. Gosselin did not hear from Mr. Redford first thing on Monday morning. She again telephoned him and informed him of the Board's position and asked him for a new date. At this point, Mr. Redford made it clear that he had neither the authority nor had he in fact agreed to a postponement of the representation vote. Mr. Redford informed Mrs. Gosselin that Mr. Bickford of the firm of solicitors in Thunder Bay had the authority to deal with her request for a new vote. At this point, Mrs. Gosselin did not telephone Mr. Bickford, rather she telephoned the Board and her call was returned by the Registrar. The Registrar advised her that Mr. Bickford had telephoned him on behalf of the respondent and had declined to agree to postponing the vote. The Registrar advised her that she would be within her rights to ask that the ballot box be sealed. As stated earlier, the representation vote was conducted by the Board on September 11. Mr. Redford was in attendance for the respondent and Mrs. Gosselin was in attendance for the applicant. Ms. Noval was present on the premises during voting times. She declined to cast a ballot.

14. The timing of a representation vote is a matter which lies within the discretion of the Board. See section 103(2) of the *Labour Relations Act* and section 68(a) and (c) of the Board's Rules of Procedure. While the Board exercises these powers, it does so after consulting with the parties who are affected by the representation vote. These parties are in a better position to know the nature of the respondent's business and the impact that this may have on the conduct of a representation vote. Clearly, the availability and opportunity of employees to cast ballots in a representation vote is affected by predictable factors such as shift work, scheduling of work, reassignment, holidays and vacations. The availability and opportunity of employees to cast ballots is also affected by unpredictable factors such as illness, injury and weather. In the process of settling the date and hour of a representation vote, the Registrar provides the parties with suggested dates and asks for the agreement of the parties to two dates on the understanding that both of these dates are available for the Board to conduct the representation vote. The Board usually conducts the representation vote on the earlier of the two dates. However, for the purposes of flexibility and availability in utilizing its staff, the Board requires two dates which are equally acceptable to the parties.

15. The parties are required to provide these two dates after informing themselves of the availability and opportunity of employees to cast ballots in the representation vote. See *Grandview Industries Limited*, [1972] OLRB Rep. June 569. Mr. Anderson in Toronto telephoned Ms. Burke in Thunder Bay who contacted Mrs. Gosselin. The agent in Toronto telephoned and checked with the respondent. Mr. Anderson and the agent informed the Labour

Relations Officer that August 29 and September 6 were available for the representation vote. Mrs. Gosselin gave evidence that she agreed to the two dates on behalf of the applicant before she had consulted with either Mrs. Brown or any of the employees in the bargaining unit. At the time she agreed to the two dates it clearly never crossed her mind that any of the three employees in the bargaining unit might not be available or have an opportunity to cast ballots. Mrs. Gosselin had observed that Mrs. MacInnes was pregnant in May of 1984. It apparently never occurred to her that Mrs. MacInnes might not be available or have an opportunity to cast a ballot in a representation vote in August or September. In agreeing to the two dates, Mrs. Gosselin was obviously considering her own availability to go to Rainy River and not the availability or opportunity of the three employees to cast ballots. On August 17 the applicant and Mrs. Gosselin were taken by surprise when a representation vote was directed in bargaining unit #1. While this state of affairs provides a background to Mrs. Gosselin's failure to make the necessary prior inquiries of the availability and the opportunity of the three employees to cast ballots in the representation vote, it does not excuse it.

16. Mr. Redford did not give evidence before the Board. However, it seems clear that he agreed that August 29 and September 6 were available for the representation vote without directing his mind to the availability and opportunity of the three employees to cast ballots. He behaved in the same manner as Mrs. Gosselin and considered only whether these dates were satisfactory to him. It is not expecting too much for the respondent's director of personnel to ascertain whether on two given dates three employees will be available and have an opportunity to cast ballots in a representation vote. Mr. Redford did not turn his mind to this issue. Mr. Redford works in Fort Frances, some fifty to sixty miles from Rainy River. He may not be in daily contact with the employees in Rainy River. While it may explain his lack of information on these three employees, it does not excuse it.

17. The Board has considered instances where employees have not been able to vote due to the timing of a representation vote. In *Ontario Cancer Foundation, Hamilton Clinic*, [1983] OLRB Rep. Feb. 246, the parties agreed on a date for a representation vote. One employee was on vacation when the representation vote was conducted and did not cast a ballot. After the representation vote had been conducted and the result was known to the parties, the respondent wrote to the Board and pointed out that an employee had been unable to cast a ballot due to the timing of the representation vote. The Board decided that the representation vote, as conducted, should stand and that the employee should not be given an opportunity to vote either singly or as part of a new representation vote. In reaching this conclusion, the Board gave two reasons for not disturbing the representation vote. Firstly, and most importantly, the respondent had input into the date the representation vote would be held and could, through careful checking, have avoided the situation. Secondly, the respondent failed to take steps promptly to petition the Board to do something about the employee's situation. It is clear from the decision that the employee was aware that he would be on vacation when the representation vote was to be conducted.

18. In *A.V. Hallam Lathing & Plastering Limited*, [1977] OLRB Rep. Sept. 602, the parties agreed that a representation vote should be held on one of two Fridays in the afternoon. A poll was opened at the agreed upon time and place on one of the two Fridays before a long weekend. However, none of the six employees listed on an agreed list of voters presented themselves at the poll to cast ballots. Five of these six employees gave evidence before the Board that the respondent employer conducted its affairs in a manner that was not different than on any other Friday, particularly a Friday preceding a long weekend. As a general rule employees were scheduled to work only until 1:00 p.m. on Fridays. Moreover, an employee



who desired to take off the entire Friday would generally be permitted to do so. The respondent would make a special effort to accommodate the wishes of an employee if it was a Friday preceding a long weekend. Where an employee was working inside the Toronto area he was scheduled to work somewhat longer hours from Monday to Thursday and was not scheduled to work at all on Friday. By virtue of this particular practice two of the six employees who were eligible to vote were not scheduled to work on the Friday in question. Despite the fact that two of the employees were not scheduled to work on the date set for the representation vote and that the others could probably take the Friday morning off if they wished, only two employees had decided prior to the evening before the representation vote that they would not be voting. The other three employees who testified stated that it had been their intention to vote. None of these three employees worked on the Friday. Subsequently, these employees consulted each other and found either that they had other plans or they would not be casting ballots in the representation vote. The Board found that the applicant trade union's officials were personally unaware of the respondent's practices with respect to work on Fridays. The Board directed the taking of a new representation vote. At page 605 the Board stated:

The Board recognizes that employees are under no obligation to cast a ballot in a representation vote, and because of this a low turnout of voters has been held not to be sufficient grounds for directing a second vote (see: *Ottawa General Hospital*, [1973] OLRB Rep. Oct. 506). In this case, however, we are concerned about the failure of any of the employees to vote. Particularly disturbing is the fact that right up to the evening prior to the vote three employees intended to vote, but each failed to do so apparently out of a fear that he might be the only one to cast a ballot. Having regard to the timing of the vote this fear was not unreasonable. The Board is concerned that employees be given a reasonable opportunity to come forward to express their wishes in a representation vote. Here, however, the fear of those employees who otherwise intended to vote that they (and presumably their choice of union) might be singled out meant that they were unable to come forward to express their wishes in the vote. We are of the opinion that the employees would likely be able to express their wishes in a representation vote held under somewhat different circumstances than the first.

19. In the instant case, the Board is equally concerned that employees be given a reasonable opportunity to come forward to express their choice in a representation vote. Mrs. Gosselin, once she was aware that only one employee would be able to vote on September 11, made efforts to try and reschedule the representation vote. She knew that Mr. Bickford in Thunder Bay was the solicitor of record for the respondent. However, she endeavoured to arrange a rescheduling through Mr. Redford. It appears that Mrs. Gosselin and Mr. Bickford do not enjoy a good working relationship and her avoidance of Mr. Bickford was met by his communicating his refusal to reschedule the representation vote to the Registrar rather than to the Registrar and to Mrs. Gosselin.

20. Mrs. Gosselin contacted the Board and asked for a rescheduling of the representation vote before its scheduled date, unlike the situation in *Ontario Cancer Foundation, Hamilton Clinic*, and made known her concerns to the respondent. Although the applicant had input into the settling of the dates for the representation vote, the applicant, as in *A.V. Hallam Lathing & Plastering Limited*, was unaware of the work schedules for two of the three employees in the bargaining unit. Both parties committed an error in their assumptions in agreeing to two dates for a representation vote. Ought these errors to be irreversible and lead the Board to refuse the applicant's request for a new representation vote? The answer to this question lies in balancing two factors, namely, the desirability of not permitting one party to repudiate an arrangement for a representation vote which has been freely entered into by that party, and, the conducting of a meaningful representation vote in all the circumstances. The date chosen for a representation vote should be an appropriate date to take a representation vote.

21. In our view, the applicant attempted to ensure that the representation vote would be meaningful and to that end sought to reschedule the representation vote. In any representation vote the employees should have a reasonable chance to cast a ballot. When a representation vote is scheduled under circumstances where two-thirds of the eligible voters are disenfranchised, all of the employees do not have a reasonable chance to cast a ballot. On occasions, the Board has delayed the taking of a representation vote until a representative number of employees are given the opportunity to cast ballots. See, for example, *Melnor Manufacturing Limited*, [1969] OLRB Rep. March 1288. The respondent did not advance any valid reason for declining to agree to a rescheduling of the representation vote.

22. In the circumstances of this application, the interest of conducting a meaningful representation vote among the employees is of greater concern to the Board than upholding an arrangement made by two parties who were unaware of the availability of two-thirds of the eligible voters on the dates the parties selected. The applicant made a reasonable effort to correct the results of its earlier negligence. The Board also appreciates that, as in *A. V. Hallam Lathing & Plastering Limited*, Ms. Noval was confronted with the realization that she would certainly be the only employee to cast a ballot if she participated in the representation vote on September 11 and that her choice would be known to both parties. The negligence of the parties should not be visited on the employees in bargaining unit #1.

23. The Board directs that the representation vote conducted on September 11 be set aside and a new representation vote be conducted by the Board. The parties are directed to consult with the Registrar in order to settle available dates for the new representation vote.

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**2019-84-M Renfrew County and District Board of Health, Applicant, v. Ontario Nurses' Association, Local 49, Respondent**

**Employee Reference — Practice and Procedure — Reconsideration — Parties negotiating alterations to scope of unit — Employer seeking to set aside amendment and vary collective agreement through section 106(2) — No issue of employee status — Nothing to reconsider as certificates spent — Section 106 not applicable**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Gordon J. Weir and Norman Lemke for the applicant; Marion M. Perrin, Dorothy Fulford and Heather Ball for the respondent.*

**DECISION OF THE BOARD;** February 7, 1985

1. This is a proceeding purportedly launched pursuant to section 106 of the *Labour Relations Act*. The facts are not in dispute.

2. On February 15, 1971, the Renfrew County Health Unit entered into an agreement recognizing the Nurses' Association, Renfrew County Health Unit as the exclusive bargaining agent for all registered and graduate nurses employed by the employer, save and except employees whose duties are of a supervisory nature. Over the years, both the health unit and the employee association underwent a change of name and form. By letter dated September 23, 1974, the Renfrew County and District Health Unit confirmed that it recognized the Ontario Nurses' Association as a successor union acquiring all of the rights, privileges, and duties under the *Labour Relations Act* of the former Local Nurses' Association. Subsequently, the parties continued to bargain collectively, signing a series of collective agreements in their present names. The most recent collective agreement was executed on July 26, 1984, and contains a recognition clause framed as follows:

The Employer recognizes the Association as the exclusive bargaining agent for all registered and graduate nurses employed by the Employer, save and except employees whose duties are of a supervisory nature.

*Home Care Co-ordinators hired after July 16, 1984, who are registered or graduate nurses, will be members of the bargaining unit.*

[emphasis added]

3. The underlined portion of the above-noted recognition clause is new. Formerly, there had never been any mention of home care co-ordinators. Accordingly, if they are registered or graduate nurses, the terms of the collective agreement indicate that they should be included in the bargaining unit.

4. But that was not the parties' practice. Apparently, the position of "home care co-ordinator" has existed for several years, but they have never been considered to be part of the bargaining unit — even though the terms of the collective agreement suggest the contrary. During the current round of bargaining, the parties decided to address that issue. The Association could have insisted on a strict application of the terms of the agreement. The employer



might have been able to argue some form of estoppel. Either assertion would have precipitated an arbitration proceeding. Instead, the bargaining parties decided on the compromise set out above, which essentially maintains the status quo for existing employees, but provides that any new employees will fall within the bargaining unit.

5. There is nothing unusual about what the parties have done. They have, through negotiations, altered the scope of the bargaining unit to exclude certain individuals who, by its terms (but not the parties' practice) would be included. The union was content to narrow the scope of the agreement to reflect the scope of its actual application. But the union was not prepared to compromise further. When the agreement was concluded in July, 1984, the parties were content with their bargain. The employer concedes that both parties were bargaining in good faith in an effort to resolve this as well as the other matters in dispute between them. Yet the thrust of this application is to re-open the settlement, and set aside or vary the collective agreement.

6. We are satisfied that there is nothing in the circumstances of this case which would trigger section 106 of the *Labour Relations Act*. The employer concedes that the home care co-ordinators are "employees" under the *Labour Relations Act*. They do not exercise "managerial functions" within the meaning of section 1(3)(b). Accordingly, there is no basis for the application of section 106(2) of the Act. Nor is there anything for the Board to reconsider under section 106(1). Bargaining rights were not initially based on any decision or order of this Board; and even if there had been a certificate issued, such basis for bargaining rights has long since been superceded by subsequent collective agreements. While a Board certificate creates an "initial licence" and obligation to bargain, once a collective agreement is signed the certificate is "spent" (see the remarks of Laskin, C.J.C. in *Beverge Dispensers and Culinary Workers' Union, Local 835 et al. v. Terra Nova Motor Inn Ltd.*, 74 CLLC ¶14,253. There is no basis for interfering with what appears to be a sensible settlement arrived at by both parties acting in good faith.

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**0039-83-R Royal Ontario Museum Curatorial Association, Applicant, v. The Royal Ontario Museum, Respondent**

**Employee — Whether heads of curatorial departments of Museum exercising managerial functions — Impact on employment of other employees stemming from professional role — Criteria for managerial exclusion not met**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members W. G. Donnelly and B. L. Armstrong.

**DECISION OF THE BOARD;** February 21, 1985

1. This decision completes the Board's adjudication of issues arising out of a certification application filed April 8, 1983. The applicant sought certification as the bargaining agent for all curatorial staff and professional librarians employed by the respondent in Metropolitan Toronto, with certain exceptions. When the application was first heard April 29, 1983, the applicant and respondent agreed that the co-ordinator of collections management, Associate Director — Curatorial and persons above the rank of Associate Director — Curatorial would be excluded from the bargaining unit, presumably on the common understanding that those persons exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. With those exclusions, the unit sought by the applicant contained approximately seventy persons as of the application date. The respondent took the position that approximately 30 employees — nineteen "heads of departments", seven "supervisors" and other curatorial staff who were members of the respondent's curatorial tenure and promotions committees — should also be excluded from the bargaining unit because they allegedly exercise managerial functions within the meaning of section 1(3)(b) of the Act. The applicant disagreed.

2. In a decision dated May 2, 1983, a differently constituted panel of the Board determined that the applicant's right to certification with respect to the appropriate bargaining unit could not be affected by the outcome of the parties' dispute, and granted the applicant interim certification with respect to curatorial staff and professional librarians, subject to the agreed exclusions and to exclusion of the disputed categories pending resolution of that dispute. The Board appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of the supervisors, heads of departments, and other persons who were members of the respondent's curatorial tenure and promotions committee.

3. The Labour Relations Officer met with the parties on twelve occasions between June 14 and October 13, 1983. In the course of those meetings, the parties came to agreement that the disputed "supervisors" did not exercise managerial functions within the meaning of section 1(3)(b) and would therefore be included in the bargaining unit. The parties also agreed that the library "head" did exercise managerial functions within the meaning of section 1(3)(b), and was therefore excluded from the bargaining unit. Rather than examine all eighteen heads of departments as to their duties and responsibilities, the parties agreed that the testimony of four department heads should be taken and considered representative of all curatorial department heads in dispute. These four department heads were examined under oath by the officer and by counsel to the parties, as were T. Cuyler Young and the respondent's Associate Director — Curatorial, Barbara Stephens, who were called as witnesses by the applicant and respondent, respectively. The examinations and cross-examinations of all six witnesses were transcribed; the transcriptions occupy 552 pages of the Officer's Report. 144 Exhibits were introduced in

the course of the witnesses' testimony. When the transcription of the testimony was completed, copies of the Officer's Report dated January 31, 1984, were provided to counsel for each party, and both counsel thereafter advised the Board that they wished to make oral representations with respect to the conclusions which the Board should draw from the Officer's Report. Those representations were made to us over the course of three days of hearing in the months of March and May, 1984. Counsel for the respondent supplemented her oral representations with written submissions filed at the beginning of the hearing, and both counsel filed supplementary written submissions by mail after the oral hearings were complete.

4. Both counsel examined the evidence in considerable detail; each marshalled the evidence so as to best support her client's position on the issue before us. Each counsel carefully reviewed the extensive jurisprudence the Board has developed with respect to issues arising under section 1(3)(b), setting forth the principles for which she contended each case stood, the policies to which she submitted we should defer in choosing between competing principles, and the route by which all of these should come together in the form of a finding in her client's favour. We have carefully considered all of the evidence and argument in arriving at our decision, our recital here of the background to and reasons for that decision; however, will be selective and relatively brief in comparison to the submissions of the parties.

5. Section 1(3)(b) of the *Labour Relations Act* provides:

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The Board's approach to section 1(3)(b) is explained in the following passages from *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84:

7. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.



The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeking that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for 'cause' or passed over for promotion on the grounds of their 'ability'. The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."



8. . . . the *Labour Relations Act* itself does not contain a definition of the term "managerial functions", nor are there any specified criteria to guide the Board in forming its opinion. The task of developing such criteria has fallen to the Board, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called "first line" managerial employees, an important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit. . . .

9. . . . the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called "effective recommendations" which materially affect the conditions of employment of those supervised. [See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. April 261; and *Inglis Ltd.*, [1976] OLRB Rep. June 270; and for a contrary view of the effect of similar provisions in the *Canada Labour Code*, see; *British Columbia Telephone 76 CLLC ¶16,015* at page 467]. In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or "input" is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising "managerial functions". . . . On the other hand, there will also be situations where individuals make serious recommendations about the employment situation or security of fellow employees. If these recommendations, on the evidence, are usually acted upon to the possible detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual's authority extends this far.

10. As collective bargaining extends to technical and professional employees (engineers, for example, were specifically included in the Act only in 1971), the Board had to deal with increasingly complex job hierarchies and reporting structures. In a professional context,

the members of the bargaining unit are likely to be highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment and requiring little external direction in the performance of their regular duties. Such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or "collegial" modes of decision-making; and one should not expect the managerial structure appropriate for professionals to be the same as that for manual workers. The technical or professional employee will have a special relationship with management, with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy.

11. Persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experienced. The most highly trained or skilled employees will routinely supervise the work of others, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Frequently, it is only the most senior or experienced employees who will fully understand the technical requirements of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgement are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees — but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower levels of skill, education or training (in the case of "master craftsmen", these would include "journey-men", "apprentices", and assorted "helpers", and in the case of "professionals", a variety of "technologists", "technicians", assistants and aides). To hold that persons with higher levels of education or training (whether acquired on the job or otherwise) exercise "managerial functions" with respect to lesser skilled or unskilled individuals at lower levels of the job hierarchy would be tantamount to saying that the Act has no application to much of highly trained and educated work force which is characteristic of the emerging high technology industries. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that the focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases.

An assessment of the applicability of section 1(3)(b) requires more than an examination of isolated job functions, as the Board observed in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379:

29. Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line that the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e. to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the

meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank of file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not of much assistance in determining what a person's functions really are.

After referring to the foregoing paragraph from the *Falconbridge* case, the Board in *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261 had this to say:

38. It is noteworthy that this test, so not to be overly exclusionary, requires that a person be *primarily* employed in the direction and supervision of employees and, as well, possess effective control or authority over those employees. Hence to the extent a person only incidentally supervises employees while working beside them (i.e., the lead hand, the working foreman — see *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. April 254) or to the extent that a supervisor is a mere advisor, conduit, or co-ordinator without effective control over employees (for example, see *The Lakehead Board of Education* [1970] OLRB Rep. February 1,331 and *CUPE and Cochrane Nursing Home Limited* [1972] OLRB Rep. June 618) section 1(3)(b) has no application. The conduit or co-ordinative function of supervision is most prevalent in the white collar or quasi-professional industries like those of health and social services. In these industries it can be said that through extensive formal education management objectives have been built into employees and supervisors perform co-ordinating and resource functions with little effective control over authority over individual employees; (see *Toronto East General and Orthopaedic Hospital, Inc.*, Board File No. 5681-74-R; *The Children's Aid Society of Huron County*, [1971] OLRB Rep. October 632; *The Burlington-Nelson Hospital*, [1971] OLRB Rep. January 2; *The Corporation of the City of Hamilton*, [1970] OLRB Rep. February 1, 283; and *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154). Just as important, these latter cases graphically reflect the Board's willingness to consider the intrinsic differences between industries.

39. But the "effective control" test has not been an easy concept to apply. When can it be said that one person exercises effective control over another? One who can discipline, discharge, transfer, promote, or demote another employee surely has such effective control. And with a similar certainty one who only incidentally supervises, instructs, reports, etc. does not. But between these extremes there is a vast penumbral area. In this shadowland a person may exercise only one or two managerial type functions or make recommendations that other decision-makers consider. Thus it is in this area that the Board has most often said it will look at the "totality" of the evidence in making its determination. . . .

As the Board observed in *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671:

Drawing the line is a particular problem where individuals are assigned more than one function, to varying degrees, or where actual decision-makers rely very very heavily on the opinion of experienced and highly trained personnel. *The Board then has to be very cautious in balancing the aforementioned interests of employers against those of employees. Otherwise fragments of an enterprise's managerial function could be distributed over a great number of individuals within the enterprise or decision-makers might rely on information pooled from a great swath of lower line personnel, thereby denying legislative coverage to a large sector of the work force.* Hence the Board has ruled that a person must be "primarily engaged in supervision and direction of other employees . . . [with] . . . effective control over their employment relation-ship", [sic] (see *Falconbridge Nickel Mines Ltd.* [1966] OLRB Rep. Sept. 370. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in



their entirety: (*Falconbridge Nickel Mines Ltd.*, [1966] OLRB M.R. 379). Moreover, titles alone are not of much assistance in determining what a person's functions really are; (see *United Steelworkers, Local 2890 v. R. McDougall Co. Ltd.*, [1943] OWN 743). Similarly, the Board has ruled that unless a person has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*) and an incidental or isolated involvement in some aspects of labour relations is not sufficient to exclude a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*).

(emphasis added)

See also *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 at paragraphs 2-7, *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199 at paragraphs 8-13 and the decisions cited in each for similar surveys of the general principles on which questions arising under section 1(3)(b) must be determined.

6. Each form of enterprise or institution has special organizational characteristics which must be taken into account in assessing at what point in the organization section 1(3)(b) will come into play to protect employer interests to the exclusion of employee rights to engage in collective bargaining. Each case turns on its facts.

7. The Royal Ontario Museum ("the Museum") was legally and physically part of the University of Toronto until 1968, when the respondent was created as a separate legal entity by provincial statute and the land, buildings and contents of the institutions known as the Royal Ontario Museum and the R.S. McLaughlin Planetarium were vested in the respondent. That provincial statute, the *Royal Ontario Museum Act*, (now R.S.O. 1980 c. 458), provides in section 3 that the objects of the museum are:

- (a) the collection and exhibition of objects, documents and books of any kind to illustrate and make known to the public the natural history of Ontario, Canada and the world;
- (b) the collection and exhibition of objects, documents and books of any kind to illustrate and make known to the public the history of man in all the ages;
- (c) the operation of a planetarium;
- (d) the promotion of education, teaching, research and publication in any or all fields related to the objects of the Museum referred to in clauses (a), (b) and (c).

The legislation provides for a Board of Trustees which is to control and manage the museum. By section 5 of the Act, the Board has the power to appoint a Director, who is the chief executive officer of the museum, an Associate Director or Associate Directors, curators, officers and staff and to fix their respective duties, salaries and qualifications. The Board is to appoint, promote, transfer or remove employees at and below the rank of Associate Director on the recommendation of the Director, who by section 6 has the power to make such recommendations. While only the power to suspend is delegated to the Director, it may safely be presumed that the recommendations of the Director are "effective" in the sense intended by the Board's jurisprudence. It is common ground that the Director exercises managerial functions within the meaning of section 1(3)(b).

8. The operations of the museum are organized into three "Streams". The eighteen curatorial departments, together with the planetarium, library and three curatorial support departments, all fall within Stream One under the supervision of the Associate Director —

Curatorial. Approximately 200 persons were employed in Stream One departments on the application date. The Planetarium, Library and 3 curatorial support departments (Conservation, Preparators, and Registration) had 20, 11, 14, 11 and 10 employees, respectively, on that date. The eighteen curatorial departments had 136 employees, including the 18 department heads or "Curators-In-Charge" whose status is in dispute. Stream Two is under the supervision of the Assistant Director — Education and Communication, and is divided into eight departments: Development and Membership, Education, Exhibit Design, Extension, Members Volunteer Committee, Museum Advisory Services, Programs and Public Relations, and Publications. There were approximately 95 full-time employees in Stream Two as of the application date. Stream Three is under the supervision of the Assistant Director — Administration and Facilities. It is divided into four departments: accounting, personnel, book and gift shop and physical plant. There were approximately 130 employees in Stream Three on the application date.

9. The museum's security guards have been represented in collective bargaining by the Service Employees Union, Local 204, since 1978. In 1980, the Ontario Public Service Employees Union ("OPSEU") applied for certification with respect to a unit consisting of all employees of the museum except the security guards and those the applicant considered "managerial". At the time, the professional curators were members of a "Joint Curatorial Council". A number of them protested inclusion in a unit with the other employees of the museum. In the result, OPSEU and the museum agreed, and on the basis of that agreement the Board determined, that a separate vote of the members of the Joint Curatorial Council be taken to determine their desires with respect to the appropriate bargaining unit. OPSEU lost that vote, but won the vote conducted among the balance of the employees affected and was certified as the bargaining agent for those "non-curatorial" employees. Department heads who were not members of the Joint Curatorial Council (all but the Library Head and 18 Curators-In-Charge) were excluded from the OPSEU bargaining unit by agreement of OPSEU and the Museum.

10. As we noted earlier, the eighteen curatorial departments in the museum had a total of 136 employees on the application date. Sixty-nine of these were professional curators excluded from the OPSEU bargaining unit. The other 67 were technicians, machinists, artists, secretaries, clerk typists and others fell within the OPSEU bargaining unit. The head of each curatorial department is a professional curator whose formal title is "Curator-In-Charge". Including the Curator-in-Charge, professional curators and support staff, the 18 curatorial departments ranged in size from four persons to sixteen, with a median of seven. The ratio of professional curators to support staff ranged from five curators and one secretary in the European department to four curators and six support staff in both the Mammalogy and Ornithology departments. The number of curators in a department, inclusive of the Curator-In-Charge, ranged from a maximum of seven to a minimum of two; four was the median.

11. Curators are academic experts with respect to the subject matter of and objects in the collections their department maintains. They consider themselves academics; many are cross-appointed to faculties of universities, particularly the University of Toronto of which the museum was once a part. The ranking of curators parallels the ranking of professors: there are "full" curators, "associate" curators and "assistant" curators. There are also lesser ranks: "curatorial assistants" and "curatorial fellows". With the assistance of their support staff, curators care for and place objects on display in the museum. They also give public lectures, do research, publish scholarly papers, act as referees for scholarly publications and, through their cross-appointments, engage in teaching.

12. Curators-In-Charge are, for the most part, “full” curators. They are placed “In-Charge” by the Associate Director — Curatorial, who makes that appointment in consultation with others, including the other curators in the department in question. The Curators-In-Charge who were examined had not seen any written description of that job. The salary and other employment benefits of a curator do not change when he or she is designated Curator-In-Charge, and Curators-In-Charge spend 80 to 90% of their time doing the sort of curatorial work done by, those curators of equivalent professional rank who have not been designated “In-Charge”. The work of a curator also involves administrative or paper work. Appointment as Curator-In-Charge or department head adds to the incumbent’s administrative work load. The witnesses’ estimates of the time spent by department heads on work associated uniquely with that position ranged from 3% to 10% of their total working time. The appointment is not a permanent one, although the length of an incumbent’s term seems flexible. There is some sense that these positions are rotated amongst those qualified for them.

13. One of the duties of “In-Charge” curators not shared by other curators is attendance at meetings called by the Associate Director — Curatorial about once per month. The weight of the evidence is that these meetings involve the exchange of information, not formulation of policy or employment relations decision-making. The Associate Director advises the department heads on matters currently before what was referred to throughout as “senior management” — that is, the Director, the Associate Director and the two Assistant Directors. In turn, the department heads convey opinions and concerns on administrative matters to and through the Associate Director.

14. A good deal of the testimony and argument focused on performance evaluation and other forms which the respondent’s personnel department had from time to time asked department heads to complete with respect to both the curatorial and the non-curatorial employees in their departments. The fact that these were invited and, for the most part, completed in some way, was urged on us as evidence of the department heads’ managerial role. However, the weight of the evidence is that, as professional curators, department heads are not prepared to engage in an evaluation of the “performance” of their professional colleagues on anything other than a professional and collegial basis. Recommendations for promotion and tenure are dealt with by the promotion and tenure committees and not individually by the heads of the departments in which the candidates work. Curatorial membership on those committees is not limited to department heads. Those committees appear to function in much the same way as the analogous committees in university institutions. Some of the department heads examined were also adverse to engaging in the evaluation process with respect to their non-curatorial co-workers otherwise than on a collegial basis. The evidence dwelt also on department heads’ involvement in “granting” vacation time, leaves, time off, overtime and so on. The evidence leaves us with the impression that these matters are regarded primarily as problems of co-ordination, in which curatorial and support staff all recognize there is a job to be done within a limited budget and that each participant in the department can fairly expect that each of these personal matters would and should be arranged so as not to create unnecessary conflict with attainment of group goals.

15. There was some evidence of the department heads’ involvement in the hiring of support staff. It would appear that candidates for a secretarial or clerical positions, for example, are pre-screened by the personnel department, which would then leave to the head of the department in which the vacancy is to be filled the right to accept or reject a candidate the personnel department found satisfactory. Again, the tendency in such circumstances seems to be for the department head to consult the other curators in his department before making such a decision.



Support staff do not fall within the bargaining unit represented by the applicant; they are represented by OPSEU, and their terms and conditions of employment are governed by a collective agreement. The respondent put some emphasis on the fact that that collective agreement contemplates department heads acting as representatives of management at step 2 of the grievance procedure. The representative of management at step 1 is "the supervisor", a category about which we heard little other than that the respondent had withdrawn a challenge that certain persons so described were managerial and had agreed they were "employees" within the applicant's bargaining unit. At step 3 the Director or his delegate acts on behalf of the Museum. The department heads seemed to have little knowledge of or involvement in the labour relations matters which arise under the OPSEU collective agreement. They had not been consulted with respect to negotiations. They had attended a meeting of some sort to discuss the then current collective agreement, but there is little or no evidence of a department head's responding to a grievance pursuant to those provisions or of the relative roles of the department head and the personnel department in formulating such responses. Indeed, there seem to be no recent evidence of a department heads having been involved in any discipline of support staff more serious than a written warning.

16. We do not propose to review all of the evidence in detail or provide a written resolution of all such conflicts as these were in it. As might be expected, the four department heads examined did not all have precisely the same impression of their duties and responsibilities; they also did not all have precisely the same commitment to collegiality, particularly in its extension to participation by support staff in departmental decision making. They did not all have the same experience in matters relevant to employer relations within the Museum, particularly in the long historical time frame over which some of the testimony extended, but all did have experience with respect to the nature of the position at the relevant time: the time the application was made. We are obliged to create for ourselves from this varied testimony a composite picture of the position of the department head at that time, and of its relation to members of the bargaining unit, members of the OPSEU bargaining unit and members of senior management conceded by all to be excluded from any bargaining unit by operation of section 1(3)(b).

17. A significant portion of the argument concerned the contrasts between the decision-making process in universities and decision-making process in industrial concerns, or what respondent's counsel termed the "collegial and bureaucratic models". Each counsel urged us to apply one model, and reject the other. They disagreed on the appropriate choice. We do not see our role as limited to a choice between models, but as requiring an assessment of the facts before us and the potential for application to them of section 1(3)(b). Models developed in Board jurisprudence may be and often are helpful in discharging that task, but labour relations does not always neatly divide itself into fixed, pre-established categories. We apprehend from the evidence that the organization of the museum is in some respects different from the organization of the universities considered in the Board's jurisprudence. We appreciate that a decision-maker may consult his colleagues and subordinates without being found to have adopted the formal committee approach described in those university cases. Of course, that observation cuts two ways. If we are to question whether what a department head does to involve his colleagues amounts to mere consultation rather than true collegial decision-making, then we must also question whether senior management has involved the department heads in anything other than a consultative process.

18. If we were obliged to select a model which best fits the position of the department head in the Royal Ontario Museum, we would select the model represented by the university

cases. Despite the differences in the two organizations, the role of the department head at the museum and the context in which it is exercised are substantially similar to the department head role and university context described in those cases, and are without clear parallel in the archetypical industrial institution. As an example, we might ask (rhetorically) what representative industrial institution has a “tenure” committee, or even a “promotions” committee, of the sort functioning at the Museum. If we were obliged to analyse the role of the department head in terms more familiar to industrial and commercial concerns, then the analogy which would best fit would be with the lead hand in an industrial unit or the working foreman in a craft or construction unit; both positions which are normally included in the units referred to. The department head is certainly not the ultimate decision-maker in matters of labour relations affecting either his colleagues within the applicant’s bargaining unit or the support staff in the OPSEU bargaining unit who work in the same department. As to those matters of greatest importance — hiring, tenure, promotion and dismissal — affecting other members of the curatorial bargaining unit, the department heads do not exercise sufficient independent discretion to justify the conclusion that they are deemed not to be employees for the purposes of the *Labour Relations Act* because they exercise managerial functions within the meaning of section 1(3)(b) of that Act. While they may have a somewhat greater impact on the employment of support staff in the OPSEU unit, a good deal of that impact stems from their professional position, rather than any particular managerial role they may play. The limited role contemplated, and rarely exercised, in the grievance procedure under the OPSEU collective agreement is, while one factor to be considered, insufficient to make the department heads “managerial” if they clearly are not otherwise.

19. One of the focuses of the respondent’s argument was that department heads were expected to act in a managerial capacity, and that the respondent’s ability to manage both the curatorial and support staff in the eighteen departments in question would be seriously undermined if we were to conclude that the department heads fell within the curatorial bargaining unit. Section 1(3)(b) requires us to examine what an employee actually does, rather than what an employer says it expects or hopes he or she will do. The evidence with respect to evaluation forms persuaded us that department heads have, for the most part, resisted attempts to confer managerial functions on them and, further, that senior management has tolerated that resistance. The orientation of the department head is much more to members of his department, and particularly his curatorial colleagues, than it is to the interests and concerns of senior management, to the extent that those may differ in matters relating to labour relations.

20. The respondent submitted that some change in its organization might be required as a result of a decision that department heads should be included in the applicant’s bargaining unit, and that it would be inappropriate for the Board to make any decision which has such an effect. The result averted to, presumably, would be the creation of a position at some intermediate level between that of the Associate Director-Curatorial and the department head. There is some evidence that such positions did exist for two or three years in the period 1976 to 1978. In any event, we adopt on this subject the following observations of the Board in *University of Windsor*, *supra*, at paragraph 8:

8. . . . The inconveniences that may ensue as a consequence of a certificate granting a trade union bargaining rights on behalf of its employees may require organizational adjustments to the employer’s decision making structure. In short, collective bargaining necessarily anticipates a re-assessment of the employer’s processes in order to accommodate the interposition of the trade union. The particular difficulties raised in this case is in resolving whether within the respondent’s organizational set-up the first line of managerial supervi-

sion ought to be drawn at the level of the department head. And in dealing with that question the Board is of the view that we are not bound by pre-existing conceptions of how individuals within the university hierarchy may construe the inherent conflicts that may arise out of the decision making powers anticipated by the respondent's incorporating statute. Needless to say, however, the exercise of managerial functions presupposes a measure of independent discretion that would be rendered ineffectual if brought in conflict with the manager's loyalties to his colleagues in the appropriate bargaining unit.

The respondent also argued that Curators-In-Charge should be excluded from the applicant's bargaining unit because non-curatorial department heads are excluded from the OPSEU bargaining unit. While we know that their departments are larger, on average, and in some cases considerably larger than the curatorial departments, we know nothing about the duties and responsibilities of those department heads. Furthermore, it is doubtful that such knowledge would have been of much assistance. The department heads were excluded by agreement of OPSEU and the Museum for reasons which are not before us. That agreement is neither binding on the applicant nor probative on the issue before us. At best, it reflects an opinion of the parties to it. We are obliged to form our own opinion on the basis of the evidence before us.

21. In the result, we are not persuaded that department heads fall within the reach of section 1(3)(b), and so conclude that they should not be excluded from the bargaining unit. Having regard to that finding and to the agreements of the parties, we direct that a final certificate be granted to the applicant with respect to the following bargaining unit:

all curatorial staff and professional librarians employed by the respondent in the Municipality of Metropolitan Toronto, save and except the library head, the co-ordinator of collections management, the associate director-curatorial, persons above the rank of associate director-curatorial and persons covered by subsisting collective agreements.

For purposes of clarity, the Board notes that, pursuant to an agreement in writing between the parties made on the 29th day of April, 1983, the bargaining unit described does not include persons who are hired for a fixed term or a project of not more than two years' duration. In addition, we note that "persons covered by subsisting collective agreements" refers to persons falling within bargaining units represented on the application date by the Ontario Public Service Employees Union and Local 204 of the Service Employees International Union. We also note that employees otherwise in the unit are not excluded by reason of membership on the promotion or tenure committees. Although the argument for exclusion of such persons was not withdrawn, counsel for the respondent did not press it in argument and we find the respondent has not established that such persons must be excluded from collective bargaining by operation of clause 1(3)(b) of the Act.

#### **ADDENDUM OF BOARD MEMBER W. G. DONNELLY;**

Employees to whom managerial responsibilities have been delegated are duty bound, in accepting such posts, to meet the obligations they have assumed. It has been strongly suggested that those involved here did not. Nonetheless, I would have disassociated myself from the majority decision had there been evidence of consistent efforts having been made by senior management to have more junior managers act as such. As there appears to have been a degree of tolerance shown towards the junior managers' failure to act as managers by their more senior supervisors, I have reluctantly concurred with my colleagues' decision.

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**2889-84-M** United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant, v. **Speed Drywal Ltd.**, Respondent

**Adjournment — Construction Industry Grievance — Practice and Procedure — Carpenters Local 18 filing grievance alleging work improperly assigned to members of Local 675 — Seeking damages but not access to work — Local 675 entitled to notice — Employer bargaining agency nor employer not representing Local 675's interest — Adjournment granted to permit notice**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members F. Burnet and L. Collins.

**APPEARANCES:** *Stanley Simpson, J. Tarbutt and T. Fenwick for the applicant, Jane A. Ford and Philip Romano for the respondent.*

**DECISION OF THE BOARD;** February 21, 1985

1. This case came before the Board by way of an application under section 124 of the *Labour Relations Act*. The matter came up for hearing on February the 11th, 1985. At the outset of the hearing, the respondent employer made an application for an adjournment on the basis that a party with an interest in the proceedings had not received notice thereof. The Board ruled on February 11th that the adjournment ought to be granted and promised the parties these written reasons to follow.
2. The applicant union alleges that under the Provincial Collective Agreement between the Carpenters Employers Bargaining Agency (EBA) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, Local 18 of the Carpenters Union enjoys bargaining rights in the Hamilton area where a new hotel called the Venture Inn is being constructed. We were told that the evidence on the merits of the case would disclose that the employer has been hiring members of Local 675 of the "Carpenters Union" to do the drywall work on this project. The applicant, Local 18 claims that this practice violates the collective agreement by denying its members work, benefits and the control of its hiring hall. However, the union says it seeks only damages, not access to the work by way of redress.
3. The employer argued that the application would inevitably affect the rights of the membership of Local 675 because, if the application is successful, members of Local 675 would be adversely affected by the loss of jobs and benefits. While it was acknowledged that the notice had been given to the employee bargaining agency, it was submitted that this could not be considered notice to Local 675 because the two locals were adverse in interest and, at best, the employee bargaining agency could only be considered as a neutral body.
4. Further, the company argued that the case raised important jurisdictional issues with implications under section 150 of the Act and that Local 675 ought to have the opportunity to argue whether the work is governed by a residential or an industrial, commercial and institutional sector. The union argued that on this and the other issues, the employer would fully and adequately represent the position of Local 675 and that their presence was therefore not necessary.
5. The adjournment was granted by the Board to enable notice to be given to Local 675 for the following reasons. This Board is reluctant to allow a union to make a claim under section

124 for damages only where access to the work is not being sought on an ongoing project. The Board clearly has jurisdiction under section 124 to declare that work protected under a collective agreement should be awarded to an applicant union. If the facts could support such a determination, and the Board were to determine that the applicant union is entitled to the work currently being given to Local 675, then the members of that local would be adversely affected by the loss of work opportunities, benefits and control of its hiring hall. The competing interest of Local 675 and Local 18 cannot be considered to be protected by their mutual bargaining agent which is, at best, neutral in this situation. Thus, notice given to that bargaining agency cannot be considered to be notice to the local in this particular fact situation. Further, it certainly cannot be accepted that the respondent employer can be expected to protect the rights of Local 675 in this case as the notice provisions are designed to ensure that an interested party can retain and instruct its own counsel or agent to protect its own particular interest in the way it chooses for itself.

6. Thus, the case was adjourned to enable the Registrar of the Board to give notice of these proceedings to Local 675. Further, the case shall reconvene on March 1, 1985.

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**0891-84-U** United Food and Commercial Workers International Union, Local 1000A, Complainant, v. **Sunnybrook Foods Limited**, Respondent

**Change in Working Conditions — Unfair Labour Practice — Complainant union displacing incumbent union and giving notice to bargain — Employer not implementing wage increase and Christmas bonus provisions of agreement with displaced union — Whether provisions of terminated agreement between employer and displaced union caught by freeze**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *Elizabeth J. Lennon, Sheila McIntyre and Pearl McKay for the applicant; S.C. Bernardo and Julie Goodbaum for the respondent.*

**DECISION OF THE BOARD;**

1. The complainant union filed a complaint under section 89 of the *Labour Relations Act* alleging several violations of sections 64, 66, 71 and 79 of the Act. All but two allegations were resolved by the parties prior to the date scheduled for hearing; that settlement was not filed with the Board.

2. The two remaining allegations both deal with the statutory freeze provision, section 79. That is, the complainant alleges that the respondent violated section 79 by failing to pay to its part-time employees a minimum wage increase in October, 1984 and a Christmas bonus in December, 1984.

3. The hearing proceeded on the basis of the following agreed statement of facts:

B E T W E E N:

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1000A

— and —

SUNNYBROOK FOODS LIMITED

AGREED STATEMENT OF FACTS

1. On September 14, 1981, Sunnybrook Foods Limited ("Sunnybrook") and the National Council of Canadian Labour, Local 206 ("N.C.C.L.") entered into a collective agreement effective December 11, 1981, to June 30, 1984 covering all part-time employees of Sunnybrook in Ontario.

2. There are five Sunnybrook stores in Ontario at the following locations:

26 Kennedy Road North  
Brampton, Ontario

221 Wilmington Avenue  
Downsview, Ontario

1050 Simcoe Street North  
Oshawa, Ontario

81 George Street  
Market Plaza  
Peterborough, Ontario

10341 Yonge Street  
Richmond Hill, Ontario

3. On June 14, 1984 the United Food and Commercial Workers International Union, Local 1000A ("the Union") applied for certification of all part-time employees of Sunnybrook in Ontario.

4. On June 21, 1984, Form 7 Notices were posted at all five Sunnybrook locations.

5. On June 30, 1984 the N.C.C.L. collective agreement expired. The N.C.C.L. had given the Company Notice to Bargain pursuant to Article 23.01 of the aforementioned collective agreement and bargaining had commenced prior to the Application for Certification being filed.

6. By order of the Labour Relations Board a pre-hearing representation vote was held at all five stores on July 14, 1984. The Complainant union



won the representation vote.

7. On August 15, 1984 their parties met with Labour Relations Officer D. Dunn and agreed to clarify the description of the bargaining unit to read as follows:

All employees of Sunnybrook Foods Limited in its stores in Ontario regularly employed for not more than twenty-eight (28) hours per week and students employed during the Easter vacation, the Christmas vacation or the period May 14th to September 17th, inclusive, save and except department managers, porters, and head office and warehouse staff.

8. On August 29, 1984 the Labour Relations Board issued a certificate certifying the United Food and Commercial Workers Local 1000A as the trade union representing part-time employees as defined in paragraph seven above for all Ontario Sunnybrook stores.

9. On August 30, 1984 the Union served notice to bargain on Mr. M. Goodbaum then President of Sunnybrook.

10. Prior and subsequent to the pre-hearing representation vote on July 14, 1984, the Union filed several unfair labour practice complaints with the Labour Relations Board. By agreement of the parties all but two complaints were settled on January 8, 1985. The two outstanding complaints are the subject of the current proceedings before the Board. Both complaints are allegations that Sunnybrook has violated Section 79(1) of the *Labour Relations Act* by failing to pay to part-time employees wages or benefits referred to in Article 19 and Article 16.03 in the N.C.C.L. collective agreement.

11. Article 19 of the N.C.C.L. agreement states:

If the Ontario minimum wage increases during the term of this agreement, all employees with one or more years of service shall receive an increase equal to the increase in the minimum wage.

On October 1, 1984, the Ontario minimum wage increased by fifteen (15) cents per hour. Although Sunnybrook increased by fifteen cents the wages of all employees earning minimum wages on or before October 1, 1984, it did not increase the wages of part-time employees entitled thereto pursuant to the terms of Article 19 of the N.C.C.L. agreement.

12. Article 16.03 of the N.C.C.L. agreement reads as follows:

A Christmas bonus of \$15.00 will be paid each year to employees who have completed 12 months consecutive service as of December 1st of that year, \$20.00 after 36 months of consecutive service and \$25.00 after 60 months of consecutive service.

No such bonus was paid to eligible part-time employees in December, 1984.

4. The parties also filed the collective agreement between the respondent and the National Council of Canadian Labour, Local 206 (N.C.C.L.), referred to in item 1 of the agreed statement of facts. Articles 16.03 and 19 have already been reproduced above (items 11 and 12). It is also useful to set out Article 23.01 of the collective agreement at this point:

#### ARTICLE 23 — DURATION OF AGREEMENT

23.01 This Agreement shall remain in effect to June 30/84, and, unless either party gives to the other party written notice of termination or of its desire to amend the Agreement, then it shall continue in effect from year to year without change.

5. Counsel for the respondent agrees that there was a statutory freeze in effect at the relevant times. However, counsel pointed to the expiration of the collective agreement on June 30, 1984 coupled with the operation of section 56 which, as of August 29, 1984, terminated the N.C.C.L.'s bargaining rights as critical factors preventing the two challenged payments from being "caught" by the freeze. Counsel argued that the words in section 56(1), "... and the agreement ceases to operate in so far as it affects such employees" meant that, after August 29th, the freeze covered only the terms of the employees' individual contracts of employment, not the terms of the collective agreement itself. The terms of those individual contracts of employment, it was argued, were to be determined by examining the employer's practice as of August 29th. Rights, such as vacation entitlement, which accrued throughout the year would be incorporated into the individual contracts of employment whereas rights occurring sporadically under the previous collective agreement (i.e., Christmas bonus, wage increase corresponding to a rise in the minimum wage) would not be so incorporated. Moreover, counsel stressed that this argument was even stronger with respect to the wage increase in view of the expressly limiting words in Article 19 of the collective agreement, namely, "... during the term of this agreement. . .". Thus, counsel for the respondent submitted that the payments were not covered by the statutory freeze. Counsel did not refer the Board to any jurisprudence although the cases cited by the applicant's counsel were distinguished. Those comments are set out *infra*, at paragraph 7.

6. Counsel for the complainant submitted that, in view of the notice to bargain by the N.C.C.L., the certification application and subsequent certification by the complainant and the notice to bargain by the complainant, there was no "gap" in the freeze period to date to nullify the terms and conditions of the N.C.C.L. collective agreement. It was argued that, where there was no previous collective agreement, the content of the statutory freeze was determined by employer practice and employee expectations. However, where there was a collective agreement in existence at the point the freeze commenced, the content of the freeze should be assessed by reference to that document. Counsel referred to *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49 in support of its position, particularly that the phrase "during the term of the collective agreement" did not preclude the substance of a clause containing that limitation from being "frozen". Counsel also cited *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association et al.*, *Re Perth District Health Unit and Ontario Nurses' Association et al.*, (1981), 120 D.L.R. (3d) 101 (Ont. C.A.) and *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859. In summary, counsel contended that the two disputed payments were terms and conditions of employment caught by the freeze and, with reference to the effect of section 56, that the legislature would not have intended that section to operate

so as to derogate from what would otherwise have been frozen because the employees had exercised their statutory right to select a different bargaining agent. In remedy, counsel sought the payment of the bonus and wage increase. The complainant also requested a posting to ensure compliance with the Board order and to publicly and formally restore the status quo, especially the employees' perception of the events subsequent to the complainant's certification application.

7. Counsel for the respondent distinguished *Kodak, supra* in that *Kodak* dealt with a right or privilege of a trade union in the context of employer past practice and should not be read broadly to apply to terms and conditions of employment where there was no such "estoppel" aspect, there was a "new" union and the operation of section 56 of the Act. The impact of section 56 was cited as distinguishing *Spar Aerospace, supra*, and *Haldimand, supra*; in the latter case, it was asserted an estoppel element was also present and a factor differentiating that case from the circumstances here. Counsel, in opposing the posting request, argued that there were no compelling policy reasons warranting such a remedy. If the Board found for the complainant, the Board could simply remain seized to ensure compliance with any order.

8. Section 79 of the Act reads, in part:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employee shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
  - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
  - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.



9. The first question is whether the Christmas bonus and the entitlement to a wage increase are “terms or conditions of employment” despite the fact that the former is a “sporadic” event and the latter is triggered by the occurrence of an event outside the control of the parties to the collective agreement, namely, an increase in the minimum wage. Matters so intimately related to wages cannot but be regarded as terms and conditions of employment. The fact that a bonus occurs only once in a twelve-month period does not change the nature of the payment. (The Board notes that, despite the use of the term “bonus”, the wording of Article 16 makes it clear that payment is an obligation, not a gratuitous act, of the employer.) Further, an obligation to increase wage rates triggered by an external event (and, COLA payments are common examples) is no less part of the wage structure because of this external trigger. Thus, both items are caught by the freeze triggered on June 14, 1984 by the complainant’s certification application.

10. Moreover, the Board affirms the reasoning in *Kodak, supra*, that the qualification “during the term of the collective agreement” cannot serve to thwart the legislative intent in section 79 to preserve the totality of the framework of employer-employee relations during the period of the freeze. The extreme example, where parties use that phrase in every clause of the collective agreement, would result in nothing being “frozen” if the analysis in *Kodak, supra*, is rejected. Because the Board regards both Articles 16 and 17 as frozen as of June 14, 1984, it is not necessary to deal specifically with *Spar Aerospace, supra*, with respect to a future promise to increase wages at a time which fell within the freeze. That is, both Articles 16 and 19 continue in full force and effect throughout the duration of the freeze.

11. What is frozen as of June 14, 1984 is not simply the terms and conditions of employment codified in the collective agreement (as yet unexpired) but the “rights” and “privileges” of the employees as well: *Ontario Hydro*, [1983] OLRB Rep. Sept. 1536; *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *Manuel DaSilva Foods Ltd.*, [1984] OLRB Rep. June 834. Thus, where there is a collective agreement in force at the date of the freeze, that collective agreement is the starting point for determining the content of the freeze. The collective agreement, however, does not comprise the sole source, rights and privileges are frozen in addition.

12. Had the freeze solely been triggered under 79(1) by the N.C.C.L.’s notice to bargain (which the parties agreed was properly given before the expiry of the collective agreement), there would have been no doubt that Articles 16 and 19 would have been caught by the freeze and, unless the freeze had ended in accordance with the statutory provisions, the bonus and wage increase would be payable. Does the interposition of the certification application by the complainant change this outcome? We think not, for several reasons.

13. A certification application which involves the displacement of an incumbent bargaining agent by another nonetheless triggers section 79(2) in order to preserve the status quo pending the resolution of the bargaining rights sought by the applicant union: *Manuel DaSilva, supra*. The application may or may not be successful. Section 56(1) of the Act merely (but importantly) formalizes the displacement where the certification is granted. That is, without section 56(1) there would be two bargaining agents representing the employees in the same bargaining unit. Likewise, once the successful applicant concluded a collective agreement, there would be two such collective agreements operating in respect of the employees in the same bargaining unit. Section 56(1), then, avoids this chaotic situation by terminating the bargaining rights of the incumbent trade union that is or was a party to the agreement and rendering the agreement itself inoperative. The Board rejects the respondent’s submission that

the phrase “and the agreement ceases to operate insofar as it affects such employees” somehow changes the content of the freeze as of the date the applicant union is certified (i.e., August 29th). In the Board’s view, this is tantamount to changing the content of the freeze in midstream. That is, what is frozen at the commencement of the freeze with respect to rights, privileges, terms and conditions of employment, continues unchanged throughout the entire period of the freeze. There is nothing in the language of section 79 which would suggest otherwise. [The Board notes that there is a change between 79(2) and 79(1) but that change serves to *add* to the freeze rights, privileges and duties of the newly certified trade union (and imposes corresponding obligations on the trade union).]

14. Moreover, the Board considers that there are no policy reasons relating to section 56 or to section 79 which would justify the result implicit in the respondent’s argument. If a certification application succeeds but the result is to derogate from the freeze initially created under section 79(2) by the certification application, this would place the employees in a worse position for the remaining period of the freeze under section 79(1) for having exercised their statutory right to select another bargaining agent. The Board is not prepared to reach such a result absent express language in the statute.

15. Finally, the Board would refer to *Ontario Hydro, supra*. It is useful to briefly set out the chronology of relevant events in that case:

April 1, 1980 — March 31, 1982 — collective agreement (Hydro, OPEIU)

March 11, 1982 — termination application

June 21, 1982 — O.P.E.I.U. bargaining rights terminated

June 24, 1982 — CUPE Certification application

July 29, 1982 — interim certificate, notice to bargain

December 22, 1982 — employee discharged

The Board held that the “just cause” provision in the expired collective agreement continued throughout the period of the freeze and reinstated the employee, subject to a minor suspension. (It was not in dispute that the freeze period had not expired as of December 22, 1982). It was assumed in *Ontario Hydro* that the freeze under 79(2), triggered by CUPE’s certification application on June 24, 1982, caught the “just cause” provision in the by-then expired collective agreement, notwithstanding a gap between the expiry of that agreement and the certification application of nearly three months or a gap (albeit brief) between the termination of OPEIU’s bargaining rights and CUPE’s certification application. In this case, there was no such gap — the complainant’s certification application was filed before the expiry of the collective agreement. The termination of N.C.C.L.’s bargaining rights resulting from the certification of the complainant occurred during the freeze under section 79(2), one day prior to the notice to bargain being given by the complainant. That notice, of course, “converted” the freeze from one pursuant to section 79(2) to one in accordance with section 79(1). Thus, *Ontario Hydro, supra*, confirms this Board’s view that the terms and conditions of employment set out in the collective agreement between the respondent and the N.C.C.L. did not cease to be part of the freeze as of August 29, 1984.

16. For the foregoing reasons, then, the Board finds that the respondent violated section 79(1) of the Act by failing to pay to eligible employees in the bargaining unit the Christmas bonus, in accordance with the provisions of Article 16.03 of the N.C.C.L.'s agreement. The Board further finds that the respondent violated section 79(1) of the Act by failing to pay to some employees in the bargaining unit the increase in wages pursuant to Article 19 of the N.C.C.L.'s agreement. The Board hereby directs the respondent to make such payments as calculated by the parties.

17. The Board, however, does not consider a posting as appropriate in the circumstances. The parties have themselves resolved all alleged violations of other sections of the Act. In respect of the allegations heard by this Board, the Board does not believe that the above declarations coupled with the compensation orders will not fully redress the violations of section 79(1) of the Act. In any event, however, the Board shall remain seized should a dispute arise over the calculation of the payments ordered or over the interpretation or implementation of this decision.

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**0213-84-OH Wilfred George Love, Complainant, v. Toronto Transit Commission, Respondent, v. Amalgamated Transit Union, Local 113, Respondent Union**

**Duty of Fair Representation — Health and Safety — Remedies — Unfair Labour Practice — Whether refusal motivated by safety concern — No license for improper conduct after invoking OHSA — Discharge for cause and not for invoking Act — No basis to substitute penalty — Union's conduct not breach of representation duty — Request for order compensating witnesses denied in circumstances**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

**APPEARANCES:** *W. Love for the complainant; Gordon F. Luborsky, E. Shaw, I. H. MacPherson, Bruno Iannacito, John Horan for the respondent company; Bryan Hackett, Derrick Wyeld and Barry Stringer for the respondent union.*

**DECISION OF THE BOARD;** February 14, 1985

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* (OHSA) alleging that the complainant was dismissed by the respondent company for invoking section 23 of that Act. Further, the complainant also alleged contravention of section 68 of the *Labour Relations Act*. The complainant asserted that the representation accorded the



complainant by the respondent union and the union's decision not to proceed with the grievance to arbitration were contrary to the provisions of section 68. Both allegations were heard together as the relevant circumstances and witnesses were common to both complaints.

2. The Board heard testimony from fourteen witnesses; the hearing lasted five days. The Board has not attempted to set out the testimony in detail. Rather, the Board has assessed the evidence of the witnesses according to the usual factors, including the firmness of their memory, their demeanour while testifying, the consistency of their evidence, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and testimony of the witnesses are considered.

3. The Board has some general comments about the relative credibility of the witnesses at this point. The Board regards the witnesses called by the respondent as highly credible — their testimony was given in a candid, straightforward manner. The complainant challenged the credibility of the respondent's witnesses asserting that on crucial points their accounts of particular incidents were almost verbatim. The Board rejects this assertion. In the Board's view, the testimony of these witnesses represents their best recollections of various events which occurred a number of months earlier. The Board finds no basis to support an allegation of collusion and, indeed, the complainant himself did not couch his assertions in such terms, when questioned on the point by the Board. The Board also does not doubt the sincerity of David Mahon and Garry Downey called by the complainant. Unfortunately, their testimony is of relatively little assistance as, at the critical moments, they were not in the immediate vicinity so as to be able to hear specific conversations. The Board further accepts the testimony of Derrick Wyeld and Barry Stringer who, although called by the complainant, were the union officials involved in the incident and handled the complainant's grievance.

4. The Board also considers it appropriate to comment on the complainant's credibility at this point. The Board does not consider that the complainant was deliberately lying or trying to mislead the Board when testifying. However, the Board is also convinced that the complainant recalls events according to his perceived immediate interest in the matter. Consequently, the complainant's testimony cannot be relied upon as an accurate account of events wherever there is a conflict between his testimony and that of the other witnesses noted in paragraph 3.

5. Having regard to the above comments, the Board makes the following findings of fact.

6. The complainant was assigned as a "slipman" to the number 13 run on route #505, the Dundas to Roncesvalles line, on Thursday, February 16, 1984. A "slipman" is a driver who replaces the regular driver in case of illness, etc. The "number 13 run" refers to the number 13, i.e., cars are sent out from the station at five minute intervals and numbered consecutively.

7. The complainant took over the vehicle, PCC 4442, from the driver on the previous shift, one J. Comeau, at 1:17 p.m. Comeau had driven the vehicle for his entire shift without encountering any difficulty with the brakes, doors or driver's seat which he could recall while testifying or reported at the time. Further, PCC 4442 had had a routine safety check on the previous day, February 15, 1984, which indicated the vehicle was in proper working order.

8. The "PCC car" is the older model of street car. The brake pedal controls three types of brakes — dynamic brakes, drum brakes and magnetic track brake. The braking system is

set out in detail in the instruction manual for operating personnel but may be briefly summarized as follows. Depressing the brake pedal 2 1/2" triggers the dynamic brake and then the drum brake in sequence. Depressing the brake pedal more than 2 1/2" activates the track brake and the more the pedal is depressed, the greater the braking effect of the track brake. Constant use of the track brake for normal stops is not encouraged as this causes rail wear.

9. At 1:30 p.m., the complainant called transit control from Shaw Street and requested a change-off vehicle because of weak drum brakes, an unstable swivel seal and an "erratic" door switch. Transit control agreed to the change-off without question. The complainant stated that he could proceed cautiously to Broadview Station for the change-off and gave 2:45 p.m. as his estimated arrival time. The complainant actually arrived at Broadview at 2:05 p.m. The complainant attributed this error to his misreading the "way-schedule" and the Board need not comment on this further. One consequence of the error, of course, was that no change-off car was available at Broadview at 2:05 p.m.

10. At approximately 1:54 p.m., PCC 4442 reached the stop at Dundas and Ontario Streets. John Moses, a TTC Inspector for over 35 years, boarded the car, asked the complainant why he was approximately five minutes late and pointed out that this was the third consecutive day the complainant had been late. [The Board notes in passing that this delay was at least in part the result of the complainant's taking over PCC 4442 a few minutes late from the previous driver]. The complainant replied in a loud voice, audible to the approximately 75 passengers, that the car had bad brakes, that he was not going to have any more accidents since he'd already been fired before for having accidents and that he had ordered a change-off vehicle for Broadview Station. Moses informed the complainant that the car following would be "short-turned" (to compensate for the delay) and that the complainant should proceed cautiously to Broadview. The complainant was asked for and reluctantly gave his badge number. As Moses left the car, the complainant loudly asked if Moses was threatening to write him up, to which Moses replied, "no".

11. In his written report, dated February 16, 1984, the complainant stated that he requested Moses to inform transit control that he would be arriving at 2:00 p.m., not 2:45 p.m., and would take the vehicle no further. The Board considers this statement (and the complainant's view of the incident with Moses) as self-serving and inaccurate.

12. On arriving at Broadview, the complainant called D. Wyeld at the union office. Wyeld confirmed that the complainant had the right, as an employee, to invoke the *Occupational Health and Safety Act*, (referred to as OHSA) and told the complainant to call transit control. The complainant did call transit control, invoked the OHSA and stated he was out of service and "the vehicle, it doesn't move". Transit control replied "Okay. We'll get you looked after". The Board noted that there were several calls to Wyeld that afternoon although each is not recounted in detail. After completing various telephone calls, the complainant went back to the platform to discuss the situation with the drivers of other cars rather than returning to his vehicle.

13. The complainant had left PCC 4442 positioned on the track so that all other cars subsequently entering the station from the Dundas line and the King line were blocked from leaving the station. Not surprisingly, the station quickly became congested. It is not necessary to determine the precise number of patrons on the platform; even the complainant put the figure at about 150. Normal service was interrupted for about forty minutes as a result of the complainant's actions.

14. Acting inspectors Haering and Mooney arrived at Broadview at virtually the same time, about 2:30 p.m., although in different vehicles. Haering proceeded toward PCC 4442 and, as he could not see the operator, entered the vehicle to see if it could be safely moved out of the way so that the blocked vehicles could exit the station. Just as Haering started the vehicle, the complainant disconnected the power pole, thus stopping the car. Mooney ran across to the complainant and asked what was going on. The complainant told Mooney about the supposed "defects", turned to the crowd in the immediate vicinity of the car and exclaimed that he had invoked the OHSA, that the vehicle was unsafe and that Mooney was not qualified to move the car.

15. Mooney told the complainant he was going to check the vehicle, entered the car and drove it some thirty feet. Mooney informed transit control that he was prepared to operate the vehicle (out-of-service) to Russell Division but was ordered to couple the car so that PCC 4442 could be pushed to Russell Division. Haering had also contacted transit control and received the same instructions. At no time was the complainant asked or instructed to operate the car. Mooney and Haering did ask the complainant to assist in the coupling procedure; the complainant refused without giving a reason.

16. The car was coupled by Mooney and acting inspector, Kovescak. The two vehicles proceeded to the Russell car house with a TTC cab in front and a TTC truck following. The complainant was asked to assist in giving hand signals to the pusher car but again refused. The complainant sat in the pusher car for the trip to Russell Division. Mooney sat in PCC 4442 giving the hand signals to the pusher car as required. The procession arrived at Russell at approximately 3:00 p.m. without incident.

17. The Board has set out the "highlights" of the events at Broadview Station and the procession to Russell Division rather than giving an account in minute detail. The complainant asserted that Haering and Mooney had "tested" the vehicle's brakes contrary to the OHSA and, further, that he refused to sit in PCC 4442 giving hand signals while the vehicle was being pushed because he would then have been in "control" of the car. The Board considers both arguments a specious use of the terms "test" and "control". PCC 4442 had no power supply, its "motion" was entirely dependent on the pusher car. The Board regards the actions of the TTC officials at Broadview and en route to Russell as appropriate in the circumstances. The Board also regards the complainant's version of these events as embellished and self-serving. Since the pusher car was driven by one Garry Downey, who was called as a witness by the complainant, the complainant's account of the "procession" could have been corroborated. However, Downey was not asked questions about this time period.

18. At Russell, superintendent Church instructed the complainant to return to Roncesvalles Division and see the divisional superintendent, J. Gordon. Gordon had been in telephone contact with transit control and Wyeld during the afternoon on several occasions and was aware of the events at Broadview. The shop steward, W. Bolychuk, was in Gordon's office for part of the time and was also kept informed.

19. The complainant arrived at Roncesvalles shortly after 4:00 p.m. and wrote out an incident report in the outer office. Gordon began reviewing the report with the complainant in his (Gordon's) office, noting the considerable discrepancies between the complainant's version and the accounts he had heard. The assistant district manager, E. Von Zittwitz, entered the office and was introduced to the complainant, at which point the complainant said he refused to stay for an interview with two TTC officials present. As the complainant left the office,



Gordon informed him he was relieved of duty. Gordon testified the complainant was relieved of duty because of his conduct at Broadview Station, but not for invoking the OHSA, and, further, that it is customary to relieve drivers from duty pending an investigation where serious misconduct is alleged. The union was immediately advised that the complainant had been relieved of duties.

20. The complainant had requested that a shop steward be present for the Gordon interview. The collective agreement does not require the attendance of a shop steward at that stage nor had Gordon received such a request before. The complainant was informed that Bolychuk was in the vicinity but, apparently, the complainant left before Bolychuk could be located. The complainant was not directly refused a steward, however.

21. The Board also notes that the complainant telephoned Wyeld upon arriving at Roncesvalles and was advised by Wyeld to fill out the incident report, turn the report in to Gordon and report for work the next morning at the usual time.

22. The complainant proceeded to a friend's house where the events were discussed and beer consumed. The group became progressively more annoyed with the situation and the complainant decided to picket Roncesvalles station the next morning. Picket signs were prepared and placed in the complainant's car.

23. About 10:20 p.m., the complainant returned to Roncesvalles station. The complainant loudly and persistently demanded of the clerk that he be allowed to sleep over at the station in the drivers' room and that the clerk wake him at 5:00 a.m. the next morning so that he could picket the division. Inspector Ian Roy Stringer came out of the office to intervene. The complainant belligerently responded to a request to leave. [The Board refers to this witness as inspector Stringer so as to avoid confusion with Barry Stringer, a union official.] Inspector Stringer returned to the office to avoid a physical confrontation with the complainant and called transit control. Supervisors J. Evans and E. Catney arrived (separately). Stringer finished his paperwork and left the division without again encountering the complainant. The Board notes that the complainant's version of this incident is not credible and that this incident is presented in summary form.

24. Supervisor Evans was instructed by transit control to proceed to Roncesvalles immediately, to "play the situation as low-key as possible" but call back if additional assistance was required. By the time Evans arrived, the complainant was not in the office. When Catney arrived shortly thereafter he stated that the complainant's car was still in the parking lot. As Catney had formerly been an inspector at Roncesvalles, he knew the complainant.

25. The complainant then returned to the office, still belligerent. The complainant conceded he swore and used abusive language. Apparently, the complainant had telephoned the Toronto Star in the interim and advised them of his version of the day's events. Catney persuaded the complainant to go with him "for a coffee". When the two returned, the complainant was calmer. Evans testified he smelled alcohol on the complainant's breath. At this point, Bolychuk arrived, spoke with the complainant briefly and the complainant finally left the station for the night. Catney, Evans and Bolychuk reviewed the evening's events. Bolychuk stated the complainant planned to demonstrate early the next morning at the station and "didn't want to listen" to the union steward's advice. Catney informed Evans that he had seen picket signs in the complainant's car. The two updated transit control on the evening's events and the planned demonstration.

26. At about 5:15 a.m., on Friday, February 17th, the complainant commenced picketing across the street from the Roncesvalles station. The placards stated "relieved of duties without shop steward" and "disciplined for invoking the OHSA". At 6:30 a.m., another inspector approached the complainant and was informed by the complainant that (in the complainant's view) he had been disciplined for invoking the OHSA and, as a candidate for the health and safety committee he wanted to show his fellow employees "he wasn't going to take it lying down".

27. About 8:00 a.m., Bolychuk asked the complainant to come to the telephone to speak to Wyeld and told him that the ministry inspectors (McGowan and Farndon) had also arrived. The complainant refused to stop picketing until the City Pulse crew arrived to interview him and film his activities. The complainant's conduct during this time clearly revealed his preoccupation with personal publicity. After City Pulse left, the complainant proceeded to have a coffee in the nearby restaurant before entering Roncesvalles division at about 9:30 a.m. to speak with the various officials from the union, the TTC and the ministry.

28. The complainant was interviewed by McGowan and Farndon in the presence of Bolychuk. The ministry officials then informed Gordon there was no violation of the OHSA in their view as the complainant had not been instructed to operate the vehicle after the Act had been invoked. The officials' written report confirmed this assessment. The ministry officials, however, agreed to proceed to Russell station to inspect the vehicle. The complainant and Bolychuk also attended at Russell division, as did J. Honan, a safety co-ordinator with the TTC.

29. The Board does not intend to recount in detail the events at Russell. It is sufficient to state that the vehicle was inspected and found in proper working order. The Board rejects the complainant's innuendo that the TTC had "covered up" the defects as entirely without foundation.

30. On Monday, February 20th, the complainant accompanied by Wyeld, met with Gordon at Roncesvalles. The events of the preceding Thursday and Friday were reviewed. The complainant was advised that a further interview was scheduled at the operations training centre (OTC) for the next day.

31. Wyeld is a long-time member of the union's executive board representing the Roncesvalles, Queensway and Lansdowne drivers. His duties include handling grievances at the local level, essentially to resolve problems if possible before the formal step 1 level of the grievance procedure (at OTC). Wyeld only attends at step 1 if so requested by the grievor and would deal with a grievance beyond step 1 only if the assistant business agent was unavailable. The Board accepts Wyeld's testimony that going to the divisional office to report to the superintendent is not considered "reporting for discipline" under the collective agreement. Being relieved of duties at the divisional level does not become "discipline" until the step 1 decision, as the individual would receive full compensation for the period of investigation if exonerated. That is, "relieved from duties" simply is an interim status to permit an investigation to be conducted.

32. The first meeting at OTC between the complainant, again accompanied by Wyeld, and Thomas Bell, operations counsellor, ended abruptly. The meeting was rescheduled for February 24, 1984. The Board does not consider it necessary to set out the exchange at this first encounter nor to recount in detail the discussion at the rescheduled meeting. At that second meeting, Bell reviewed the events of February 16th and 17th and the complainant's general record. The complainant had started employment with the TTC in July 1981. Since then he

had been interviewed at the divisional level at least fourteen times and four times at the OTC level with respect to collisions, accidents, public relations matters and attendance. In October 1983, the complainant had been dismissed for his involvement in a rear-end collision and for his general record. That dismissal was grieved by the union and the complainant was reinstated on appeal on the condition that he improve his general record to TTC standards. In fact, although reinstated as of October 25, 1983, the complainant had only returned to driving a few days before February 16th. At the step 1 meeting on February 24th, Bell informed the complainant that he was terminated because of the events of February 16th and 17th and his general record; the complainant was also advised of his right to appeal and he indicated an appeal would be filed.

33. It is convenient to summarize briefly the contact between the complainant and the union to this point. On Thursday, February 16th, the complainant spoke with Wyeld by telephone on several occasions. Wyeld informed the complainant he was entitled, as an employee, to invoke the OHSA if he felt conditions were unsafe and later advised the complainant to hand in his report to the divisional superintendent at Roncesvalles and report for duty the next morning. Bolychuk had spoken with the complainant in the late evening of Thursday when the complainant had returned to Roncesvalles and caused the incidents already mentioned. Bolychuk had also spoken with the complainant the next morning while the complainant was picketing and had endeavoured to persuade the complainant to stop picketing, to speak with Wyeld by telephone and meet with the ministry officials. As noted, the complainant refused to stop until after City Pulse filmed and interviewed him. Wyeld could not attend at Roncesvalles that morning as he was in an executive board meeting but was in contact with Bolychuk and repeatedly tried to contact the complainant.

34. Wyeld accompanied the complainant to the February 20th meeting with Gordon and both meetings with Bell at step 1 at OTC. Wyeld met with the complainant for about 15-20 minutes before the February 21st interview. Wyeld was informed by the complainant of the supposedly conflicting reports of the complainant's witnesses as to the events at Broadview. Wyeld informed Bell of this and interviewed the drivers (Mahon and Downey). Wyeld was also later involved in the decision of the executive board not to proceed with the grievance to step 4, arbitration.

35. The complainant asserted that the union had improperly represented him on previous occasions. While the Board need not actually assess the nature of the representation accorded the complainant as these matters are not strictly before this Board, the Board would comment that the assertion is without merit. On the evidence, the union investigated the complainant's grievances even when a matter was raised long after the event. In one instance, the union refused to go to arbitration because reports of several union members conflicted with the complainant's version. On another occasion, after the dismissal in October, 1983, the union actively represented the complainant and succeeded in winning his reinstatement on appeal. In addition, there was no indication whatsoever of any personal animosity directed by union officials toward the complainant.

36. Barry Stringer, the assistant business agent, handled the step 2 and step 3 appeals (and had handled the complainant's appeal in October, 1983). The complainant instructed Stringer that the appeal was to be based on the OHSA only. The complainant was also insisting that he be reinstated with full compensation and the entire events of February 16th and 17th be struck from his record. Stringer was aware of the complainant's version of events from lengthy conversations with the complainant and from reviewing the TTC officials' reports.



Stringer also spoke with Mahon, Downey, Wyeld and Bolychuk. At the step 2 meeting, Stringer accompanied the complainant and challenged the discipline as instructed. The assistant district manager, Von Zittwitz responded that the complainant was dismissed for his general record, including the events of the 16th and 17th, but not for invoking the OHSA.

37. The step 3 meeting was held with Stringer, the complainant, Ed Shaw (manager, labour relations) and Ian McPherson (assistant manager) present. At this meeting, Stringer again based the appeal on the OHSA, as demanded by the complainant. The company's position did not change.

38. The Board would comment here that Stringer repeatedly advised the complainant that the complainant's demands were unreasonable, that he should settle for reinstatement. The complainant demanded that Stringer conduct the case as instructed. Stringer considered that the complainant had no justification for invoking the OHSA, that his conduct warranted some discipline but that there was a chance of reinstatement if the grievance was based on the complainant's general record. The complainant adamantly refused to listen to this advice throughout the grievance process.

39. After step 3, the grievance was considered by the union executive board. The complainant attended the meeting, presented his version of events and was questioned by the board. The executive board consists of the business agent, assistant business agents, vice-presidents, secretary-treasurer, six traffic board members and six maintenance board members. The complainant refused to modify his position. The executive board decided not to proceed to arbitration; the complainant was advised of the decision and his right to appeal to the general membership meeting by Wyeld.

40. The complainant appealed to the general membership meeting. Again, the complainant stated his position and refused to permit the grievance to go forward on his general record despite the public entreaties of at least three of the executive board members, including Stringer. As is usual, the executive board explained its recommendation to the members present. The executive considered that the arbitration would fail if argued on the OHSA issue and feared setting a harmful precedent. Wyeld, however, spoke on the complainant's behalf, as did three or four other union members. The general membership meeting, by a 28-10 margin, voted against proceeding to arbitration. The Board would add that the complainant had apparently regularly attended and participated at a number of general membership meetings in the latter half of 1984. The complainant asserted that the vote was a sham since so few attended and, of those present, a number were executive board members. The Board rejects this submission. There was no suggestion that the meeting was improper in any way. The vote cannot be considered "tainted" merely because so few union members chose to attend. And, there is no basis for assuming that, had the turnout been larger, the outcome would have differed.

41. The complainant also appealed to the international and shortly thereafter filed this complaint with the Board. The international ultimately rejected the complainant's appeal but, given these proceedings, it is not necessary to deal further with this aspect.

42. The Board notes, as well, that the complainant was running for election at the time of the events in question and acknowledged that his decision to invoke the OHSA was designed to show his concern with health and safety issues. The complainant also conceded that his perception of the incident with Moses at Ontario Street influenced his decision to invoke the OHSA at Broadview.

43. Counsel for the respondent company asserted that the evidence of the company witnesses should be preferred to that of the complainant. With respect to the OHSA itself, counsel submitted that, firstly, the complainant fell outside the protection of the OHSA as the complainant did not have "reason to believe" that the equipment was likely to endanger himself or another worker [section 23(a)]. Secondly, it was argued that the complainant was at no time ordered or requested to operate the vehicle once the complainant invoked the OHSA at Broadview station. Moreover, transit control had readily agreed to the complainant's earlier request for a change-off vehicle even though the OHSA had not been mentioned at that point and it was the complainant who offered to drive the vehicle to Broadview. The "second tier" of the statutory scheme, then, was never reached, in counsel's view. Counsel reviewed the evidence and contended that the TTC had acted properly in moving the vehicle from Broadview station and in terminating the complainant for his conduct on February 16th and 17th. Counsel submitted the complainant's invoking of the OHSA had played no part in the company's decision to discharge the complainant. Counsel acknowledged that the Board had the authority, under section 24(7) of the OHSA, to substitute another penalty for the discharge but asserted that the Board should not set aside the termination in the circumstances. Counsel referred to a number of cases in support, including *Burlington Carpet Mills Canada Ltd.*, [1980] OLRB Rep. Oct. 1361; *Josh Industries Incorporated*, [1981] OLRB Rep. June 718; *International Harvester of Canada, Limited*, [1983] OLRB Rep. June 898; *Dowty Equipment of Canada Ltd.*, [1983] OLRB Rep. Sept. 1451; *General Motors of Canada Limited*, [1984] OLRB Rep. Mar. 459; *Re Steel Co. of Canada Ltd.*, (1973) 4 L.A.C. (2d) 315; *Re Eastern Steelcasting (1981)*, 28 L.A.C. (2d) 310; *Inco Metals Company*, [1982] OLRB Rep. Sept. 1315; *R. v. Hawke*, [1974] 3 O.R. (2d) 210 (Ont. High Ct.).

44. With respect to the company's argument, the complainant submitted that he had, in fact, been disciplined for invoking the OHSA on February 16th and for his general concerns with safety matters over the past year. The complainant stated he had invoked the OHSA as a last resort, to bring attention to what he considered were a myriad of unsafe practices and conditions. Once he decided to run for election for the health and safety committee, the complainant said he felt he had to "take a stand" and "couldn't pass the buck on safety". The complainant also reviewed the evidence and submitted the issue of credibility should be resolved in favour of his testimony and that of Downey and Mahon rather than the company's witnesses. Specifically, the complainant stated he had not been insubordinate at Broadview and had not been ordered to assist in coupling with the car.

45. The complainant characterized his being relieved of duties by Gordon as discipline in breach of the collective agreement. [On this point, the Board has indicated its acceptance of Wyeld's testimony that discipline was not imposed at Gordon's level; see paragraph 32 above.] The complainant also described the incident with Moses as an attempt to intimidate him for driving safely toward his change-off at Broadview. The Board rejects this assertion on two bases: Moses' account of the incident is preferred to that of the complainant; the complainant had not yet invoked the OHSA.

46. The complainant referred to a number of cases in support of his position, including particular excerpts which he asserted expressed his feelings on safety matters: *Re Hunter Rose Co. Ltd.* (1980), 27 L.A.C. (2d) 338; *International Harvester, supra*, at 911; *Inco Metals, supra*, at 1321; *Re Robertshaw Controls Canada Inc.* (1982), 5 L.A.C. (3d) 142; *Re North Central Plywoods (Division of Northwood Pulp and Paper Ltd.)* (1982), 8 L.A.C. (3d) 406.

47. The complainant acknowledged that his record was not exemplary. However, in the complainant's view, events just "snowballed" from the point at which he had invoked the OHSA at Broadview. Because he had invoked the OHSA, the complainant considered that he should not be penalized for the "snowball" effect. In short, the complainant requested the Board to find in his favour and reinstate him so that he could continue to "promote safety" without the threat of dismissal if the OHSA was again invoked.

48. With respect to the alleged violation of section 68 of the *Labour Relations Act*, the complainant asserted that the union had only superficially represented him during the grievance process. Further, the union had not investigated matters properly and had believed the company's witnesses, in the complainant's view. The complainant contended that, having initiated the grievance based on the OHSA, the union was obligated to proceed to arbitration on that basis. The Board notes that some of the complainant's other points regarding the union's conduct have been dealt with *infra* (see paragraphs 18, 30, 36 and 41, for example).

49. Counsel for the respondent union asserted that the union had acted properly in investigating the incidents and in representing the grievor within the strict limitations imposed by the complainant himself. Moreover, the complainant repeatedly rejected the union's advice as to how to proceed. Counsel contended that the appropriate procedures were followed throughout, including at the executive board and general membership meeting levels. Specifically, the complainant was aware of the grievance process and actively participated at the executive board and general membership meetings. Counsel did not review the evidence at length but submitted that the complainant, although not deliberately lying, was not a credible witness. In summary, counsel argued that there was no evidence on which to find a violation of section 68 and, indeed, the union had properly represented the complainant, as it had in the past. Counsel referred to R. E. Brown, *The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests under the Duty of Fair Representation in Ontario*, [1982] 60 Can. Bar. Rev. 412 and the cases cited therein (particularly at 415, 420, 421-2, 423, 434, 440, 453 and 459) in support. Finally, counsel urged the Board not to lightly overturn the union's decision not to proceed to arbitration. That decision had been reached after full consideration, firstly, of the merits of the grievance itself and, secondly, of the impact on the long-term relationship between the union and the company of arbitrating this grievance.

50. Counsel for the respondent union also stated he refrained from requesting costs because of the Board's general policy on awarding costs and because legitimate complaints might thereby be discouraged. However, counsel did request that the Board dismiss the complaints but direct that the complainant compensate the numerous witnesses who were subpoenaed, some of whom attended for several days waiting to testify and others who had no knowledge of the events relevant to the allegations before the Board. The Board is not unsympathetic to the circumstances of witnesses who are subpoenaed and suffer financial loss as a consequence. This unfortunate situation is exacerbated where, as here, several of those subpoenaed either did not testify at all or, conversely, attended for several days before being called. Nonetheless, the Board does not consider it appropriate to order compensation as requested. The prospect of such liability could be just as daunting to a complainant as an award of costs. There may be truly extraordinary circumstances where the Board might consider such relief but such an order would not be appropriate in the present circumstances.

51. The OHSA entitles a worker to refuse to work in specified circumstances. Section 23(3) of the Act provides:



(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

52. The OHSA also protects workers who have exercised their rights under the OHSA. Section 24(1) provides:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

53. The complainant claimed to have invoked the OHSA at Broadview station because of his concern for health and safety, specifically the defective drum brakes, door toggle and driver's seat. The Board should be hesitant to conclude that the complainant was motivated by other considerations, given the importance of the health and safety matters: *Cooper Construction Company Ltd.*, [1981] OLRB Rep. Aug. 1113. In this case, however, the Board has concluded that the complainant did not act out of safety concerns in respect of PCC 4442 at that point in time. There is no question that the complainant regards himself as strongly committed to safety issues. That particular vehicle had passed a safety inspection the previous day and had been driven for the preceding shift without any indication the drumbrakes were "weak". The vehicle also passed a safety inspection at Russell division subsequent to the complainant's allegations. The Board also noted that the drum braking system is integrated with the track brakes. That is, merely depressing the brake pedal slightly more than 2 1/2" automatically activates the track brakes. There was never any suggestion that the track brake system was not in good working order.

54. The Board regards the complainant's decision to stand for the health and safety committee and the incident with Moses at Ontario Street as the real basis for the invoking of the OHSA at Broadview. That is, the complainant had resolved to "publicize" his commitment to health and safety issues to win election to the committee. This is not to say the complainant selected that day to invoke the OHSA before going to work. Rather, the Board is of the view that the complainant gets "caught up" in events in pursuit of an abstract principle. In that sense, the complainant's description of the "snow ball effect" is apt. It was apparent the complainant disliked driving PCC vehicles in general; he requested a change-off almost immediately on starting his shift. The exchange with Moses just exacerbated the complainant's low regard for supervisors and inspectors. In the complainant's mind, the earlier request for

a change-off vehicle simply justified all the subsequent events as another “health and safety” fight with the complainant leading the way. The complainant’s insistence that the union challenge his dismissal solely under the OHSA adds further support to the Board’s view that the complainant acted from motives outside the protection of the OHSA, i.e., beyond the right to refuse to perform work which is likely to endanger himself or another worker.

55. Moreover, if the Board was satisfied that the complainant had a *bona fide* “reason” to invoke the OHSA, Mr. Love’s complaint under section 24 of the OHSA would not succeed as the employer has met its onus of proving that no action was taken against the complainant for exercising his rights under the OHSA. (See, for example, *Baltimore Aircoil of Canada*, [1982] OLRB Rep. Mar. 327.) In the instant case, the Board has no doubt that the respondent company dismissed the complainant for reasons other than the complainant’s invoking of the OHSA at Broadview. Firstly, the Board would stress that transit control, without question, agreed to a change-off vehicle when telephoned by the complainant from Shaw Street. It was the complainant who unilaterally suggested he drive the car to Broadview. Secondly, the complainant was at no time ordered or requested to operate the vehicle once the OHSA had been invoked at Broadview. The complainant’s refusal to operate the vehicle was accepted by transit control without hesitation. Transit control even ordered the vehicle to be coupled up and pushed to Russell division after Mooney stated he was willing to drive the vehicle to Russell.

56. The protection in section 24(1) against reprisals cannot be construed as a licence for a worker to engage in clearly improper conduct subsequent to invoking the OHSA (see: *Josh Industries Incorporated*, *supra*). The complainant committed numerous acts of unprovoked insubordination and other employee misconduct: refusal to couple up the disabled vehicle or to assist in giving hand signals to the driver of the pusher car; the statements made to patrons on the platform at Broadview regarding the TTC and safety; the abusive conduct later on the evening of the 16th toward Stringer, Catney, Evans, etc.; the picketing of the Roncesvalles division on the 17th. These examples merely highlight instances of unacceptable behaviour by the complainant on the 16th and 17th of February.

57. The Board, then, finds that the complainant was discharged for cause and not for invoking the OHSA. The Board must next consider whether, under the authority of section 24(7) of the OHSA, the Board should substitute another penalty for the dismissal. See, *Baltimore Aircoil*, *supra*; *Inco Metals Company*, *supra*. The Board is not persuaded that there is any basis on which to interfere with the company’s choice of penalty. In addition to the clearly unacceptable behaviour of the complaint on the 16th and 17th of February, there is the complainant’s general record. To say that the general record, as summarized in paragraph 33, cannot be described as exemplary is an under statement. Nor is the complainant a long-service employee. In short, there are no mitigating factors to warrant interference with the company’s decision. The Board, then, finds that the penalty imposed was just and reasonable in the circumstances.

58. The Board now turns to an examination of the alleged violation of section 68. Section 68 reads:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

59. The duty imposed by section 68 has been elaborated in a number of Board decisions. One of the most useful summaries is found in *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 (the Gormley case) at paragraph 18:

Over the years many aspects of the duty of fair representation have settled into place. The Board has repeatedly held that in order not to act in an arbitrary manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles. Additionally, a union is prohibited from processing a grievance in bad faith. An employee must not become the victim of the union's ill will such that a dislike for an individual dictates the path of the grievance rather than the merits of the grievance or legitimate concerns for the welfare of the bargaining unit and bargaining process. The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for so doing. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

60. It is also appropriate to refer briefly to another decision, *Antonio Melillo*, [1976] OLRB Rep. Oct. 613 at paragraph 14:

14. Most unfair representation complaints arise, as did this one in the context of a union decision not to carry a grievance to arbitration. It is well established that the duty imposed on a trade union by section 60 does not require it to process through to arbitration every grievance which a bargaining unit employee wishes proceeded with. An employee has no absolute right to have his grievance arbitrated (see *Gebbie and Longmoore*, [1973] OLRB Rep. Oct. 519). The key assumption underlying this legal conclusion is that the settlement of disputes and grievances of employees under the terms of a collective agreement is an extension of the collective bargaining process, a process in which the interests of particular individuals must of necessity yield to the *legitimate* interest of the group.

61. In the instant case, the union officials proceeded with the complainant's grievance throughout the steps in the grievance procedure. An investigation was conducted, the complainant's suggested witnesses were interviewed. In the context of that investigation, however, it was only sensible for the union to consider the reports of the company witnesses as well. The union clearly "turned its mind" to the merits of the grievance. It was an eminently reasonable (and, indeed, a correct) assessment that the OHSA had not been violated by the company in the circumstances. That assessment was communicated to the complainant on numerous occasions by a number of union officers.

62. Moreover, the union repeatedly urged the complainant to rescind his instructions as to how the grievance was to proceed and permit the union to argue the case on the basis of the complainant's general record. These entreaties were also ignored by the complainant who stubbornly clung to his own perception of events.

63. The complainant's grievance was considered by the executive board in accordance with the union by-laws. The complainant attended that meeting, presented his case and



answered questions. The decision of the executive board not to proceed to arbitration was presented to a general membership meeting, again, as per the by-laws. At that meeting as well, the complainant presented his position. Other union members, including Wyeld, spoke on the complainant's behalf. The vote affirmed the executive board's decision not to proceed to arbitration.

64. In the Board's view, there was nothing in the union's conduct which could be said to contravene the duty imposed under section 68 of the Act. Indeed, the union officials stressed that the grievance would have undoubtedly proceeded to arbitration had the complainant agreed to argue the case on his general record rather than the OHSA. The complainant, quite simply, was the author of his own misfortune with respect to the alleged violation of section 68 of the Act.

65. Accordingly, the complaints alleging violation of the OHSA by the respondent company and alleging contravention of section 68 of the Act by the respondent union are hereby dismissed.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1985

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**1002-84-R:** Ontario Public Service Employees Union, (Applicant) v. The Children's Aid Society of the County of Perth, (Respondent).

Unit #1: "all employees of the respondent in the County of Perth, Ontario, save and except assistant supervisors, persons above the rank of assistant supervisor, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week." (14 employees in unit). (*Having regard to the representations of the parties*).

Unit #2: "all employees of the respondent in the County of Perth, Ontario, regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, save and except assistant supervisors, persons above the rank of assistant supervisor, and office and clerical employees." (7 employees in unit).

**1158-84-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Citicom Inc., (Respondent) v. The Canadian Guards Association, (Intervener).

Unit: "all employees of the respondent at the Rideau Centre, Ottawa, save and except supervisors, persons above the rank of supervisor, security guards, office and clerical staff, janitorial personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

**1404-84-R:** Teamsters Local Union No. 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Westburne Industrial Enterprises Ltd., (Respondent).

Unit: "all employees of the respondent in its Distribution Services Division in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in unit).

**1447-84-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., (Applicant) v. Woodbridge Foam Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Tilbury, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (143 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1741-84-R:** United Steelworkers of America, (Applicant) v. Sonco Steel Tube Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent employed at 95 Van Kirk Drive in the City of Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in unit).

Unit #2: (See: *Bargaining Agents Dismissed Subsequent to a Post-Hearing Vote*).

**2035-84-R:** Canadian Textile & Chemical Union, (Applicant) v. Compass Plastics Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2178-84-R:** Service Employees International Union, Local 532 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Flamoro Downs Holdings Limited, (Respondent).

Unit #1: "all employees of the respondent in the Maintenance and Janitorial Departments of Flamboro Downs Racetrack at Dundas, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, security guards, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent in the Maintenance and Janitorial Departments at Flamboro Downs Racetrack at Dundas, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in a maintenance or janitorial capacity, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office and clerical staff and security guards." (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2278-84-R:** United Food & Commercial Workers International Union, Local 175, (Applicant) v. Marks & Spencer Canada Inc., (Respondent).

Unit: "all employees of the respondent at its Peoples Division in Donville, Ontario, save and except assistant manager, persons above the rank of assistant manager and the secretary to the manager." (12 employees in unit). (*Having regard to the agreement of the parties*).

**2388-84-R:** Local Union 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Felix Lopes Sheet Metal Limited, (Respondent).

Unit #1: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**2407-84-R:** Office & Professional Employees International Union, (Applicant) v. Budget Car Rentals Toronto Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all office and clerical employees at the Head Office of the respondent in the City of Mississauga

regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Secretary to the General Manager and the Secretary to the President." (6 employees in unit). (*Having regard to the agreement of the parties*).

**2464-84-R:** Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Jaslow Glass Industries Ltd. (c.o.b. Artistic Lighting), (Respondent).

Unit: "all employees of the respondent in Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (21 employees in unit). (*Having regard to the agreement of the parties*).

**2484-84-R:** Labourers' International Union of North America, Local 183, (Applicant) v. DuBois Chemicals of Canada Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons covered by subsisting collective agreements." (2 employees in unit). (*Having regard to the agreement of the parties*).

**2489-84-R:** Ontario Nurses' Association, (Applicant) v. Beacon Hill Lodges of Canada Ltd., (Respondent).

Unit: "all registered and graduate nurses of the respondent employed in a nursing capacity at Windsor, save and except the director of nursing and persons above the rank of director of nursing." (22 employees in unit). (*Having regard to the agreement of the parties*).

**2496-84-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. Gall Construction Limited Acapulco Pools, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2518-84-R:** Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Smith's Southwestern Services Inc., (Respondent).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

**2521-84-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Columbus McKinnon Limited, (Respondent).

Unit: "all employees of the respondent in Cobourg, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (106 employees in unit). (*Having regard to the agreement of the parties*).

**2534-84-R:** Food and Service Workers of Canada, (Applicant) v. Participation Apartments — Metro Toronto, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except head aides, persons



above the rank of head aide, office and clerical staff.” (35 employees in unit). (*Having regard to the agreement of the parties*).

**2536-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. G. W. Robinson Company Limited, (Respondent).

Unit #1: “all employees of the respondent at its warehouse operation at Stoney Creek, save and except supervisors, persons above the rank of supervisor, office staff, retail store employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (65 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent at its warehouse operation at Stoney Creek, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and retail store employees.” (2 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2543-84-R:** London and District Service Workers’ Union Local 220, (Applicant) v. Millwrights and Machine Erectors Local 1592, United Brotherhood of Carpenters and Joiners of America, (Respondent).

Unit: “all office and clerical employees of the respondent at Sarnia, save and except supervisors and persons above the rank of supervisor.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2544-84-R:** Sheet Metal Workers’ International Association Local Union #285, (Applicant) v. B. A. Heating and Air Conditioning Ltd., (Respondent).

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2547-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Jim Excavating & Grading Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**2570-84-R:** Local 1964 of the International Brotherhood of Electrical Workers, (Applicant) v. Peterborough Utilities Commission, (Respondent).

Unit #1: “all office and clerical employees of the respondent, regularly employed for no more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, secretary to the general manager, students employed during the school vacation period, and persons covered by subsisting collective agreements.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours

per week, save and except foremen, persons above the rank of foreman, students employed during the school vacation period, and office and clerical employees.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2605-84-R:** Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Northwestern General Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener #1) v. Ontario Public Service Employees Union, (Intervener #2).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods, save and except supervisors and foreman, one secretary to each of the following: Executive Director, Assistant Executive Director, Director of Nursing, Director of Purchasing, Director of Human Resources, Director of Finance, Business Office Supervisor, Admitting Supervisor, Communications Supervisor, and persons covered by subsisting collective agreements.” (36 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2632-84-R:** The Canadian Union of Public Employees, (Applicant) v. Participation House Project (Durham Region) Inc., (Respondent).

Unit: “all employees of the respondent in the Region of Durham, Ontario, save and except supervisors, persons above the rank of supervisor.” (30 employees in unit). (*Having regard to the agreement of the parties*).

**2644-84-R:** Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. V.S. Services Limited, (Respondent).

Unit #1: “all employees of the respondent at Carefree Lodge in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and employees in the bargaining unit for which another trade union held bargaining rights on December 24, 1984.” (6 employees in unit). (*Clarity Note*).

Unit #2: “all employees of the respondent at Carefree Lodge in the Municipality of Metropolitan Toronto employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and employees in the bargaining unit for which another trade union held bargaining rights on December 24, 1984.” (12 employees in unit). (*Clarity Note*).

**2645-84-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Waldorf Astoria Hotel, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except department heads, persons above the rank of department head, office and clerical staff, persons regularly employed for no more than 24 hours per week, students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2646-84-R:** Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The North York General Hospital, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, Ontario, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.” (291 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2660-84-R:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of

America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Keller & Associates Mechanical Contractors Inc., (Respondent).

Unit #1: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all millwrights and millwrights' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2670-84-R:** Association of Allied Health Professionals: Ontario, (Applicant) v. The Wellesley Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all paramedical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (122 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2696-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. B. W. Wilson Construction Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**2980-83-R:** United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Imperial Flavours Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except supervisor, persons above the rank of supervisor, quality control and office staff." (24 employees in unit).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		16

**0618-84-R:** United Steelworkers of America, (Applicant) v. Ebel Quarries Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Amabel, County of Bruce, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (14 employees in unit).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		5
Ballots segregated and not counted		6



**1796-84-R:** Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. McBride's Delivery Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, brokers, office, clerical and sales staff." (35 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		12
Ballots segregated and not counted		3

**2176-84-R:** St. Catharines Fabricators Association, (Applicant) v. Nesbitt Metal Fabricators Limited, (Respondent) v. Sheet Metal Workers' International Association Local Union 537-568, (Intervener).

Union: "all employees of the respondent at its plant(s) at St. Catherines, save and except those employees presently covered by other subsisting collective agreements, non-working foremen, persons above the rank of non-working foreman, office and sales staff and students employed during the school vacation period." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		9
Number of ballots marked in favour of intervener		0

**2193-84-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Astro Dyeing & Finishing Ltd., (Respondent).

Unit: "all employees of the respondent in Hawkesbury, Ontario, save and except office staff, foremen and persons above the rank of foreman." (89 employees in unit).

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	34	
Number of ballots marked in favour of applicant		32
Number of ballots marked in favour of incumbent		2

### Applications for Certification Dismissed — No Vote Conducted

**1804-84-R:** Syndicat Des Employes De Almico Plastics, (Applicant) v. Almico Plastics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cornwall, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff." (30 employees in unit).

**1951-84-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Allweather Windows (Edmonton) Ltd. Allweather Glass Ltd., (Respondents). (3 employees in unit).

**2277-84-R:** Teamsters Local Union No. 352 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Barouh Eaton (Canada) Ltd., (Respondent). (28 employees in unit).

**2471-84-R:** Local Union #562 Sheet Metal Workers' Association, (Applicant) v. Latendorf Conveying Industries, (Respondent) v. Group of Employees, (Objectors). (7 employees in unit).

**2523-84-R:** Ontario Secondary School Teachers' Federation, (Applicant) v. Simcoe County Board of Education, (Respondent). (155 employees in unit).

**2546-84-R:** Labourers' International Union of North America Local 506, (Applicant) v. Pacific Northern Rail, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener). (9 employees in unit).

**2676-84-R:** Local 1590, International Brotherhood of Electrical Workers, (Applicant) v. International Time Recorder Company Limited, Troybrights Industries Limited, Canadian Parking Equipment Limited, (Respondent). (21 employees in unit).

**2680-84-R:** Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the City of Scarborough, (Respondent) v. Ontario Public School Teachers' Federation, (Intervener). (541 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1876-84-R:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Simpsons Limited, (Respondent) v. Simpsons Limited, (Respondent) v. Group of Employees, (Intervener).

Unit: "all employees of the respondent at 176 Yonge Street and 31 Richmond Street West, Toronto, save and except Department Supervisors, persons above the rank of Department Supervisor, security staff, management trainees, office and clerical staff, pharmacists, pharmacists student trainees, optometrists, persons covered by the subsisting collective agreement between the respondent and the Canadian Union of Operating Engineers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university." (2,000 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		677
Number of persons who cast ballots	595	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		277
Number of ballots marked against applicant		296
Ballots segregated and not counted on agreement		20

**2375-84-R:** The Canadian Union of Public Employees, (Applicant) v. Scarborough General Hospital, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, employed as Stationary Engineers, save and except Assistant Director of Maintenance and Engineering, persons above the rank of Assistant Director of Maintenance and Engineering and persons covered by subsisting collective agreement." (10 employees in unit).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		4

**2387-84-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Imperial Restaurant & Tavern Ltd. (Respondent).

Unit: "all employees of the respondent at the Kingston Shopping Centre, 1100 Princess St., Kingston,

Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff." (24 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised list		31
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		20
Ballots segregated and not counted		2

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0151-83-R:** International Brotherhood of Electrical Workers Local 1687, (Applicant) v. Campbell Red Lake Mines Limited Detour Lake Project, (Respondent) v. Sudbury Mine, Mill and Smelter Workers Union, Local 598, (Intervener #1) v. United Steelworkers of America, (Intervener #2).

Unit: "all employees of the respondent at Detour Lake in the District of Cochrane, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in laboratory and in the engineering geological and metallurgical departments, security guards, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period." (7 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		113
Number of names of persons who cast ballots	102	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		96
Number of ballots marked in favour of United Steelworkers of America,		43
Number of ballots marked in favour of International Union of Operating Engineers, Local 793,		53
Ballots segregated and not counted		6

**0161-83-R:** United Steelworkers of America, (Applicant) v. Campbell Red Lake Mines Limited Detour Lake Project, (Respondent) v. International Brotherhood of Electrical Workers, Local 1687, (Intervener #1) v. International Union of Operating Engineers, Local 793, (Intervener #2) v. Sudbury Mine, Mill and Smelter Workers Union, Local 598, (Intervener #3)

Unit: "all employees of the respondent at Detour Lake in the District of Cochrane, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in the laboratory and in the engineering geological and metallurgical departments, security guards, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period." (111 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		113
Number of names of persons who cast ballots	102	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		96
Number of ballots marked in favour of United steelworkers of America,		43
Number of ballots marked in favour of International Union of Operating Engineer, Local 793		53
Ballots segregated and not counted		6



**0249-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Campbell Red Lake Mines Limited Detour Lake Project, (Respondent).

Unit: "all employees of the respondent at Detour Lake in the District of Cochrane, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in the laboratory and in the engineering geological and metallurgical departments, security guards, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period." (111 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		113
Number of names of persons who cast ballots	102	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		96
Number of ballots marked in favour of United Steelworkers of America,		43
Number of ballots marked in favour of International Union of Operating Engineer, Local 793,		53
Ballots segregated and not counted		6

**1741-84-R:** United Steelworkers of America, (Applicant) v. Sonco Steel Tube Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1 (See: *Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent employed at 95 Van Kirk Drive in the City of Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

**2407-84-R:** Office and Professional Employees International Union, (Applicant) v. Budget Car Rentals Toronto Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all office and clerical employees at the Head Office of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, Secretary to the President, Secretary to the General Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (24 employees in unit).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	27	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		15
Ballots segregated and not counted		1

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2260-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Lamco Construction Limited, (Respondent).

**2470-84-R:** Sheet Metal Workers' International Association, (Applicant) v. Libby, McNeil & Libby of Canada (Container Factory), (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 35, (Intervener).

**2575-84-R:** United Steelworkers of America, (Applicant) v. Home Technics Ltd., (Respondent) v. Group of Employees, (Objectors).

**2663-84-R; 2664-84-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Molson's Brewery (Ontario) Limited, (Respondent) v. Canadian Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 306, (Intervener #1) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Intervener #2).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**3077-83-R:** Locals 1316 and 1946 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Candesco (1978) Ltd., 551067 Ontario Limited carrying on business as Interspace Interior Contracts and ECI Ltd., (Respondents). (*Dismissed*).

**1118-84-R:** International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Goodenough Electric Company Goodenough Electric Company Limited A.F. Goodenough Appliance Service Limited, Tyson Electric (1979) Limited, Tyson Electric Limited, Goodenough & Appliance Electric Inc., (Respondents). (*Granted*).

**1677-84-R:** London & District Service Workers' Union, Local 220, (Applicant) v. Caressant Care Nursing Home of Canda Limited, VS Services Ltd., (Respondent). (*Dismissed*).

**2233-84-R:** Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Valee-Way General Contractors Incorporated and Vallie Construction Ltd., (Respondents). (*Granted*).

**2788-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. Mark Brdar carrying on business as Mark Carpentry and Brdar & Sons Ltd., and/or Mark Brdar carrying on business as Brdar & Sons, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**0035-78-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Exhibition Stadium Corporation; The General Contractors's Section of the Toronto Construction Association; Canadian National Exhibition Association, (Respondents) v. The General Contractors' Section of the Toronto Construction Association, (Intervener #1) v. Labourers' International Union of North America, Local 506, (Intervener #2). (*Withdrawn*).

**1118-84-R:** International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Goodenough Electric Company, Goodenough Electric Company Limited, A.F. Goodenough Appliance Service Limited, Tyson Electric (1979) Limited, Tyson Electric Limited, Goodenough & Appliance Electric Inc., (Respondents). (*Granted*).

**1435-84-R:** Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. 586827 Ontario Limited (Venture Inns), (Respondent). (*Dismissed*).

**1678-84-R:** London & District Service Workers' Union, Local 220, (Applicant) v. Caressant Care Nursing Home of Canada Limited, VS Services Ltd., (Respondents). (*Dismissed*).

**2047-84-R:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd. and Kilbyrne Investments Inc., (Respondents). (*Granted*).

**2050-84-R; 2051-84-R:** Sheet Metal Workers International Association, Local 473, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd. and Kilbyrne Investments Inc., (Respondents). (*Granted*).

**2234-84-R:** Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Vallee-Way General Contractors Incorporated and Vallie Construction Ltd., (Respondents). (*Granted*).

**2448-84-R:** United Brotherhood of Carpenters and Joiners of America — Millworkers Local Union #802, (Applicant) v. Rivard Roof Truss, (Respondent). (*Withdrawn*).

**2465-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd., and Kilbyrne Investments Inc., (Respondents). (*Granted*).

## UNION SUCCESSOR RIGHTS

**1418-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Indusmin Ltd., et al, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0564-84-R:** Jack G. Riddell, (Applicant) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Burchell Supply Limited, (Intervener).

Unit: "all journeymen and apprentice carpenters employed by the intervener in the Province of Ontario engaged in the industrial, commercial and institutional sector of the construction industry. (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

**1298-84-R:** Dean Woods, (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, (Respondent).

Unit: "all full-time and part-time male and female employees of Beverley Tavern in Toronto employed in the beverage department as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages." (4 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

**1358-84-R:** Terry Schisler, (Applicant) v. Teamsters Union Local 938, affiliated with the International



Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Brink's Canada Limited, (Intervener).

Unit: "all employees of the respondent at North Bay, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (130 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

**1455-84-R:** Leonard Fox, (Applicant) v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Brink's Canada Limited, (Intervener). (130 employees in unit). (*Dismissed*).

**2041-84-R:** Consolidated Bathurst Packaging Limited, (Applicant) v. International Union of Operating Engineers and its Local No. 796, (Respondent). (Nil employees in unit). (*Granted*).

**2042-84-R:** Erma Goddard, (Applicant) v. Local 1105P, United Food and Commercial Workers International Union, (Region 18), A.F.L., C.I.O., C.L.C., (Respondent) v. P & H Foods, Division of Parrish and Heimbecker Limited, (Employer). (130 employees in unit). (*Dismissed*).

**2091-84-R:** Royal Canadian Region Branch #9, Employees, (Applicant) v. Hotel, Restaurant & Cafeteria Employees Union, (Respondent).

Unit: "all employees of the Royal Canadian Legion Branch #9 in Kingston, Ontario, save and except manager, office and sales staff." (24 employees in unit). (*Dismissed*).

Number of persons on list as originally prepared by employer		24
Number of persons who cast ballots	19	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		19

**2098-84-R:** Ahmed Quadri, John Rizek and David Wolstencroft, on their own behalf and on behalf of other employees, (Applicants) v. United Food & Commercial Workers Local 206 chartered by United Food & Commercial Workers International Union, (Respondent) v. St. Hubert Bar-B-Q Ltd., (Intervener).

Unit: "all employees at the St. Hubert Bar-B-Q restaurant at 1510 Finch Avenue East, Willowdale, save and except for Restaurant Manager, Kitchen Manager, Dining Room Manager, one Assistant Kitchen Manager and one Assistant Dining Room Manager." (57 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		65
Number of persons who cast ballots	51	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		50

**2102-84-R:** Joe Cicchini, (applicant) v. Service Employees Union, Local 204, (Respondent).

Unit: "all employees of Baron Metal Industries Inc. in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (25 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		28
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Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		19

**2142-84-R:** Employees of Ewing & Gregers Woodworking Limited, (Applicant) v. Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (11 employees in unit). (*Dismissed*).

**2143-84-R:** Gary Samler, (Applicant) v. Canadian Paperworkers Union, (Respondent) v. Total Graphics Limited, (Intervener). (61 employees in unit). (*Dismissed*).

**2292-84-R:** Irene Blais, (Applicant) v. Carleton Roman Catholic School Board Employees Association, (Respondent) v. Carleton Roman Catholic Separate School Board, (Employer). (25 employees in unit). (*Dismissed*).

**2319-84-R:** Pat Steele, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Respondent) v. Canada Trustco Mortgage Company, (Intervener). (25 employees in unit). (*Dismissed*).

**2320-84-R:** Karen Hunter-White on behalf of the Employees of General Printing Ink Corporation of Canada Limited, (Applicant) v. Chemical, Energy and Allied Workers, Division of Canada Conference of Teamsters Union, Local 424, (Respondent) v. General Printing Ink Corporation of Canada Limited, (Intervener).

Unit: "all office and clerical employees of General Printing Ink Corporation of Canada Limited in Metropolitan Toronto, save and except supervisors, confidential secretaries, those above the rank of supervisor and confidential secretary, sales staff, laboratory staff, and employees covered by a subsisting collective agreement." (4 employees in unit). (*Granted*).

**2321-84-R:** Employees of T.C. Industries, (Applicant) v. United Steelworkers of America, (Respondent) v. TC Industries, (Intervener).

Unit: "all employees of the intervener employed at Guelph, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical employees, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (25 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		18
Number of ballots marked against respondent		15

**2339-84-R:** Yves Boileau, (Applicant) v. Carleton Roman Catholic School Board Employees Association, (Respondent) v. Carleton Roman Catholic Separate School Board, (Employer). (45 employees in unit). (*Dismissed*).

**2614-84-R:** International Association of Machinists and Aerospace Workers, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, et al., (Respondents). (13 employees in unit). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2677-84-U:** The U.F.C.W. Building Corporation United Food & Commercial Workers International Union, (Applicant) v. The Office and Professional Employees Union, Local 343, Kathy Maddison, Barbara Freeman, Rita Goba, Jerilynn Hilock, Jean McDermott, Elizabeth Soerensen and Johanne Zinni, (Respondents). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**3063-83-U:** Ken O'Leary, Alex Chow and a Group of Employees, (Complainants) v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union Local 1414J, (Respondent). (*Withdrawn*).

**0623-84-U:** Thomas Beck, (Complainant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Respondent). (*Dismissed*).

**0764-84-U:** Thomas J. Maynard, Gerald A. Larocque, Jim Cameron, (Complainants) v. Christian Labour Association of Canada, (Respondent). (*Withdrawn*).

**0965-84-U (D); 0965-84-U (E):** Ontario Public Service Employees Union, (Applicant) v. Oshawa General Hospital, York-Finch General Hospital, (Respondents). (*Dismissed*).

**1018-84-U:** Ontario Public Service Employees Union, (Complainant) v. Family and Children's Services of London and Middlesex, (Respondent). (*Withdrawn*).

**1101-84-U:** Bogdn Kuchta, (Complainant) v. Amalgamated Transit Union 113, (Respondent) v. Toronto Transit Commission, (Intervener). (*Dismissed*).

**1196-84-U:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States of Canada, Local Union 46, on its own behalf and on behalf of Giancarlo Cesaroni, (Complainants) v. R. L. Coolsaet of Canada Limited, (Respondent). (*Dismissed*).

**1367-84-U:** St. Catharines Typographical Union Local 416, (Complainant) v. High Times Publication Ltd., (Respondent). (*Withdrawn*).

**1405-84-U:** United Steelworkers of America, (Complainant) v. Mitten Vinyl Inc., (Respondent). (*Withdrawn*).

**1422-84-U:** United Brotherhood of Carpenters and Joiners of America, Local Union 16689, (Complainant) v. Don Hager Contractor, (Respondent). (*Dismissed*).

**1546-84-U:** Service Employees International Union, (Complainant) v. Flamboro Downs Holdings Ltd., (Respondent). (*Dismissed*).

**1661-84-U:** Jeanette Kirkpatrick, (Complainant) v. The Corporation of the Town of Oakville, its Servants and Agents, (Respondents) v. Canadian Union of Public Employees and its Local 1329, (Interveners). (*Withdrawn*).

**1679-84-U:** London & District Service Workers' Union, Local 220, (Complainant) v. Caressant Care Nursing Home of Canada Limited, (Respondent). (*Dismissed*).

**1717-84-U:** Ontario Public Service Staff Union, (Complainant) v. Peter Warrian and the Ontario Public Service Employees Union, (Respondent). (*Withdrawn*).



**1789-84-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Formula Plastics Inc., (Respondent). (*Withdrawn*).

**1880-84-U:** United Steelworkers of America, (Complainant) v. Ebel Quarries Ltd., (Respondent). (*Withdrawn*).

**1881-84-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. Ontario Hydro; International Union of Operating Engineers & United Brotherhood of Carpenters and Joiners of America, (Respondents). (*Withdrawn*).

**1886-84-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Italo Canadian Polishing & Buffing of Windsor Ltd., (Respondent). (*Withdrawn*).

**2034-84-U:** Jack J. A. Widder, (Complainant) v. Canadian Union of Public Employees, Local 922, (Respondent) v. Board of Education for the City of North York, (Intervener). (*Dismissed*).

**2067-84-U:** United Food and Commercial Workers International Union, (Complainant) v. P & H Foods, Division of Parrish & Heimbecker, Limited, (Respondent). (*Withdrawn*).

**2141-84-U:** A Council of Trade Unions, Acting as Representative and Agent of Teamsters, Local Union 230 and Labourers International Union of North America, Local 183, (Complainants) v. The Metropolitan Toronto Sewer & Watermain Contractors Association, (Respondent) v. See Attached List – Schedule “A”, (Interveners). (*Withdrawn*).

**2255-84-U:** Kevin Clarke, (Complainant) v. Energy and Chemical Workers Union Local 41: Ralston Purina of Canada Inc., (Respondent). (*Withdrawn*).

**2285-84-U:** National Brewery Workers' Union, Local No. 1, (Complainant) v. Labatts Ontario Breweries Limited (London Plant), (Respondent). (*Withdrawn*).

**2293-84-U:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Complainant) v. Lanewood Corp. and Lanewood Mechanical Contractors, (Respondent). (*Withdrawn*).

**2308-84-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Woodbridge Foam Corporation, (Respondent). (*Withdrawn*).

**2311-84-U:** Robert G. Bowie Jr., (Complainant) v. TimberJack Logging Equipment, (Respondent). (*Withdrawn*).

**2341-84-U:** Health, Office & Professional Employees, a division of the United Food & Commercial Workers Union, Local 206, Chartered by the United Food & Commercial Workers International Union, (Complainant) v. Tyndall Nursing Home Limited, (Respondent). (*Withdrawn*).

**2391-84-U:** Office & Professional Employees International Union, (Complainant) v. Budget Rent a Car, (Respondent). (*Withdrawn*).

**2408-84-U:** Marion McLean, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1535, and Northern Telecom Canada Limited, (Respondent). (*Dismissed*).

**2414-84-U:** L'Hotel – CN Hotels, Incorporated, (Complainant) v. Hotel Employees and Restaurant Employees, International Union, AFL-CIO-CLC, Local 75, (Respondent). (*Withdrawn*).

**2461-84-U:** Bruce Hartley Davidson, (Complainant) v Towers Foods, (Respondent). (*Withdrawn*).

**2484-84-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Uniflex Packaging of Canada Limited, (Respondent). (*Withdrawn*).

**2485-84-U:** Canadian Union of Restaurant and Related Employees Hotel Employees & Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Complainant) v. Imperial Restaurant and Tavern Limited, (Respondent). (*Withdrawn*).

**2538-84-U:** Rodney E. J. Papak, (Complainant) v. Carling O'Keefe Union Local 325, (Respondent). (*Withdrawn*).

**2567-84-U:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 on behalf of Nick Warus & Brendan Downey, (Complainant) v. Felix Lopes Sheet Metal Ltd., (Respondent). (*Withdrawn*).

**2574-84-U:** Retail Clerks Union, Local 1977, (Complainant) v. Zehrs Markets, (Respondent). (*Withdrawn*).

**2601-84-U:** Laborers' International Union of North America Local 1267, (Complainant) v. Paperap and Bag, (Respondent). (*Withdrawn*).

**2607-84-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Van de Hogen Material Handling Inc., (Respondent). (*Withdrawn*).

**2652-84-U:** Patrick Burns, (Complainant) v. W. J. Robb, (Respondent). (*Withdrawn*).

**2659-84-U:** Food and Service Workers of Canada, (Complainant) v. Participation Apartments — Metropolitan Toronto, (Respondent). (*Terminated*).

**2666-84-U:** Heldur Kaljaste, (Complainant) v. Joseph Brant Memorial Hospital, (Respondent). (*Withdrawn*).

**2675-84-U:** Christine Racine, (Complainant) v. Karl Rauchberger, (Respondent). (*Withdrawn*).

**2677-84-U:** The U.F.C.W. Building Corporation United Food & Commercial Workers International Union, (Applicant) v. The Office and Professional Employees Union, Local 343, Kathy Maddison, Barbara Freeman, Rita Goba, Jerilynn Hillock, Jean McDermott, Elizabeth Soerensen and Johanne Zinni, (Respondents). (*Withdrawn*).

**2683-84-U:** James E. Hutton, (Complainant) v. Local 512 — Graphic Communications International Union, (Respondent). (*Withdrawn*).

**2725-84-U:** R. E. Byers, (Complainant) v. CUEW, Local #2, (Respondent). (*Withdrawn*).

**2785-84-U:** Uniflex Packaging of Canada Limited, (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent). (*Withdrawn*).

**2853-84-U:** Rita Moro, (Complainant) v. U.A.W., Local 673, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**1889-84-M:** Jean Leclerc, (Applicant) v. Upholsterers' International Union of North America, AFL CIO, by its agent, Local 400, (Respondent Trade Union) v. Queen City Bedding Co. Ltd., (Respondent Employer). (*Dismissed*).

**2355-84-M:** Pauline Barbary, (Applicant) v. Carleton Roman Catholic School Board Employees' Association, (Respondent Trade Union) v. Carleton Roman Catholic School Board, (Respondent Employer). (*Dismissed*).

**2431-84-M:** Louise Sweeney, (Applicant) v. Carleton Roman Catholic School Board Employees' Association, (Respondent Trade Union) v. Carleton Roman Catholic School Board, (Respondent Employer). (*Dismissed*).

## APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**2513-84-M:** Corby Distilleries Limited, (Employer) v. The Distillery Workers' Union, Local 96, (Trade Union). (*Granted*).

## FINANCIAL STATEMENT

**2155-83-M:** Irene Bovay, (Complainant) v. Canadian Union of Public Employees, Local 16, (Respondent). (*Dismissed*).

## APPLICATION FOR EMPLOYEE STATUS

**1545-83-M:** United Plant Guard Workers of America, Local 1962, (Applicant) v. Ontario Jockey Club, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**0903-84-OH:** Donald Putman, (Complainant) v. Tecumseh Products of Canada, Limited, (Respondent). (*Dismissed*).

**0904-84-OH:** Norman Rae, (Complainant) v. Tecumseh Products of Canada Limited, (Respondent). (*Dismissed*).

**0905-84-OH:** John McKinnon, (Complainant) v. Tecumseh Products of Canada, Limited, (Respondent). (*Dismissed*).

**0906-84-OH:** Thomas Edward Monger, (Complainant) v. Tecumseh Products of Canada, Limited, (Respondent). (*Dismissed*).



**0994-84-OH:** Patrick B. Saul, (Complainant) v. Toronto Transit Commission, (Respondent). (*Withdrawn*).

**2348-84-OH:** Charles Lafrance, (Complainant) v. Taylor Steel Inc., (Respondent). (*Withdrawn*).

**2526-84-OH:** Canadian Union of Public Employees, (Complainant) v. Vocational Rehabilitation Centre of Metropolitan Toronto, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**1271-80-M:** The Carpenters' District Council of Toronto and Vicinity on behalf of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Exhibition Stadium Corporation; The General Contractors' Section of the Toronto Construction Association; Canadian National Exhibition Association, (Respondents). (*Withdrawn*).

**2953-83-M:** The International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario, on its own behalf and on behalf of the International Brotherhood of Electrical Workers Local Union 1788, (Applicant) v. The Electrical Power Systems Construction Association (EPSCA) and Ontario Hydro, (Respondents). (*Dismissed*).

**1444-84-M:** International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Goodenough Electric Company, Goodenough Electric Company Limited, A.F. Goodenough Appliance Service Limited, Tyson Electric (1979) Limited, Tyson Electric Limited, Goodenough & Appliance Electric Inc., (Respondents). (*Granted*).

**1454-84-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Blok Mechanical Contractors Ltd., (Respondent). (*Granted*).

**1497-84-M:** Sheet Metal Workers International Association, Local Union 397, (Applicant) v. Tri-North Sheet Metal Limited, (Respondent). (*Granted*).

**1959-84-M:** United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. MCY Construction, (Respondent). (*Granted*).

**2129-84-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 1 Hamilton, (Applicant) v. A. B. Dick Masonry Ltd., (Respondent). (*Withdrawn*).

**2228-84-M:** Ontario Provincial Conference and Locals 5, 6, 14 of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. M. Alzner Contractors Ltd., (Respondent). (*Granted*).

**2286-84-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. G. T. M. Contracting, (Respondent). (*Withdrawn*).

**2400-84-M:** The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, District Council 46, (Applicants) v. Toronto Painting and Decorating (1982) Inc., (Respondent). (*Granted*).

**2437-84-M:** Sheet Metal Workers International Association, Local 397, (Applicant) v. Metalbestos Erectors Limited, (Respondent). (*Granted*).

**2439-84-M:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd. and Kilbyrne Investments Inc., (Respondents). (*Granted*).

**2440-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd. and Kilbyrne Investments Inc., (Respondent). (*Granted*).

**2441-84-M:** Sheet Metal Workers International Association, Local 473, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd., and Kilbyrne Investments Inc., (Respondents). (*Granted*).

**2442-84-M; 2443-84-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. XDG Limited, Carl De Wilde Contracting Ltd. and Kilbyrne Investments Inc., (Respondents). (*Granted*).

**2509-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Nortek Plant Services Ltd., (Respondent). (*Withdrawn*).

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**2548-84-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Bre-Ex Limited, (Respondent). (*Withdrawn*).

**2554-84-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. M. Alzner Contractors Limited, (Respondent). (*Withdrawn*).

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**2564-84-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Stock Mechanical Inc., (Respondent). (*Withdrawn*).

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**2568-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Internorth Construction Company Limited, (Respondent). (*Granted*).

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**2651-84-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 700, (Applicant) v. ETCO Steel Tank Erectors Ltd., (Respondent). (*Granted*).

**2657-84-M:** Labourers' International Union of North America, Local 247, (Applicant) v. Harbridge & Cross Limited, (Respondent). (*Granted*).

**2669-84-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Bramalea Limited, (Respondent). (*Withdrawn*).

**2685-84-M:** Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Valee-Way General Contractors Incorporated and Vallie Construction Ltd., (Respondents). (*Withdrawn*).

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**2709-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Bennett Paving & Materials Limited, (Respondent). (*Withdrawn*).

**2710-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Bill Price Excavating Ltd., (Respondent). (*Granted*).

**2759-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Richard Lessard Construction, (Respondent). (*Granted*).

**2777-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Nick Giacalone Woodworking Ltd., (Respondent). (*Granted*).

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**0960-83-U:** Cameron Douglas Wonch, (Complainant) v. Rapid Ready Mix Limited, (Respondent). (*Dismissed*).

**1404-84-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Westburne Industrial Enterprises Ltd., (Respondent). (*Dismissed*).



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*Ontario Labour Relations Board,  
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M7A 1V4*

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**March 1985**



Ontario

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. MARCH**

**EDITOR: NIMAL V. DISSANAYAKE**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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# NOTICE OF NEW PRACTICE NOTE

## PRACTICE NOTE NO. 17

March 1, 1985

### APPLICATIONS FOR RECONSIDERATION

1. The Board may reconsider, vary, or revoke any decision, order, direction, declaration or ruling, pursuant to Section 106(1) of the *Labour Relations Act*, R.S.O. 1980 c. 228, as amended. Section 106(1) reads as follows:

"The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

2. A request for reconsideration should be submitted in writing, addressed to the Registrar of the Board, along with all of the submissions in support thereof. The party requesting reconsideration should file with the Registrar four (4) copies of the request for reconsideration and submissions in support, together with an additional copy for each of the other parties to the original proceeding.

3. Where a party is requested to file submissions with the Board in response to an application for reconsideration, such submissions must be received by the Board within two weeks from date of mailing of the request or such longer period as the Board may designate.

4. The Board has stated in *K-Mart Canada Limited (Peterborough)*, [1981] O.L.R.B. Rep. Feb. 185, at ¶4:

"To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.)."

5. The Board has also stated in *John Entwistle Construction Limited*, [1979] O.L.R.B. Rep. Nov. 1096 at ¶5:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

“Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.”

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.”



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**3172-84-U Bird Construction Company Limited and Mollenhauer Limited, Contractors and Engineers, Applicants, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers — C.L.C. Local 325 Etobicoke and Larry Masiak, Richard Anthony, Andrew Post, Bradley Tripp and James Mullally, Respondents**

**Lockout — Picketing — Strike — Employer's production employees on lawful lockout — Employer extending own buildings acting as own general contractor and engaging two other general contractors — Locked-out employees picketing construction gate and shutting down work — Whether "in connection with" primary dispute — *Sarnia Construction* decision distinguished — Effect of amendment to strike/lockout provisions in Act discussed**

**BEFORE:** R. O. MacDowell, Vice-Chairman.

**APPEARANCES:** *Bruce Binning for the applicants; Martin Levinson, G. Greco and R. Starley for the respondents.*

**DECISION OF THE BOARD;** March 25, 1985

1. This is an application filed under section 135 of the *Labour Relations Act*. It concerns certain picketing activity which is currently occurring at the Toronto premises of Carling-O'Keefe Breweries of Canada Limited ("Carling"). The applicant employers "Bird" and "Mollenhauer" contend that this picketing is contrary to the *Labour Relations Act*. The provisions of the Act which may be relevant to this matter are as follows:

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) *Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.*

92. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike *or any person has done or is threatening to do an act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike*, the Board may so declare and it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

135.-(1) Where, on the complaint of an *interested person*, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or

that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or *any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike*, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials, or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

117. In this section and in sections 118 to 136,

• • •

- (f) "trade union" means a trade union that according to established trade union practice pertains to the construction industry.

[emphasis added]

The underlined portions of sections 92 and 135 were added in the summer of 1984 by Bill 75, *The Labour Relations Amendment Act, 1984* S.O. 1984, c.32, s.2.

2. Carling is a well-know producer of beer. It operates a large brewery on Carlingview Drive in Metropolitan Toronto. Carling has a longstanding collective bargaining relationship with the respondent "Brewery Workers Union". The Brewery Workers Union represents Carling's production, office and delivery employees.

3. Carling is currently in the process of substantially expanding the productive capacity of its brewery on Carlingview Drive. The expansion programme involves an addition and extension to the buildings currently housing the company's fermentation, bottling, brew house and power house facilities. It also involves the installation of a new high speed bottling line and an automated aluminum can line. Bruce MacDonald, Carling's industrial relations manager, explained that the promotion of the company's "Miller" brands has been so successful that it was simply unable to meet the market demand. It was imperative that the company increase its capacity to brew and store beer, through the expansion of its physical facilities and the introduction of more efficient and sophisticated equipment. The sooner that can be accomplished, the sooner Carling will be able to exploit the potential market.

4. Bird and Mollenhauer are two general contractors engaged on Carling's expansion project. Both companies employ their own employees and have subcontracting arrangements with a number of specialty construction subcontractors. These construction industry employers, including the applicants, are all bound by collective agreements with various construction trade unions.

5. Carling, the "owner-client" is also acting as its own general contractor in respect of certain aspects of the work. Carling has entered into direct contractual relationships with construction subcontractors who supply services or perform work on Carling's brewery expansion project. Those contractors, in turn, also have contractual and collective bargaining relationships with various construction trade unions. There is no evidence that Carling itself has any collective bargaining relationship with any construction union. In December, 1984, after a meeting with the Ministry of Labour, Carling undertook the responsibility of being designated the "constructor" for the purposes of the *Occupational Health and Safety Act*. An official of Bird testified that Bird and Mollenhauer were unwilling to shoulder that responsibility when

they had no direct control over the subcontractors with whom Carling had direct dealings. The “constructor” is at the top of the legal pyramid and is under an obligation to ensure that the subcontractors on a job site comply with the legislated safety requirements and rectify any deficiencies which may arise. The ongoing construction work is being monitored by Carling’s firm of architects and consulting engineers.

6. Until recently, there was construction activity going on all over the industrial site where the production employees usually work. The construction workers use Carling’s established road network to travel to their respective work locations. So do Carling’s production employees. Ralph Morris, the plant engineer, testified that, in recent months, Carling became concerned about traffic congestion and safety. The roads were becoming rough and frequently congested with construction vehicles. In order to help alleviate these problems and better control parking and traffic flow, Carling decided to reopen a second gate at the north west corner of its property. It was intended that this gate would be reserved exclusively for the use of construction workers. Carling’s own employees would be required to use the north east gate.

7. Mr. Morris testified that the “construction” gate reopened about September, 1984. Initially it was under the control of Bird. About two months ago, Carling’s own security agency took over responsibility for controlling the passage of employees and vehicles through both of the gates. The employees and the security officers have all been instructed to adhere to the rule that the north-west gate is to be used exclusively by construction employees, and the north-east gate is reserved exclusively for Carling’s production workers.

8. The evidence establishes that the scheme of separate gates has not been entirely successful — perhaps because the gates are at opposite ends of the same road network and, no doubt, there is a natural tendency (particularly in winter) for workers to want to use the most convenient gate, and park in an area close to their work station. Nevertheless, I am satisfied that, by and large, most employees do respect the established rules.

9. In recent weeks, Ontario’s three major breweries — Carling, “Molson’s”, and “Labatt’s” — have been involved in negotiations with the Brewery Workers Union with a view to concluding new collective agreements. On February 26, 1985, these three companies decided to lock out their employees. The lockout is lawful. Its purpose is to put economic pressure on the employees and force the respondent union to agree to the companies’ terms.

10. The beer producers are acting in concert and presenting a common front in order to maximize the economic pressure on their production employees and minimize their own economic risk. So long as all major competitors are shut down, the union cannot play one against the other, and no company can reap a market advantage because of a competitor’s labour problems. It is a kind of “employer solidarity” which is just as understandable and potentially effective as its employee counterpart.

11. On February 12, 1985, about two weeks before the lockout, Greg Greco, the president of Local 325 of the Brewery Workers Union, met with Bruce MacDonald, Carling’s industrial relations manager. Greco indicated that, in the event of a strike or lockout, the company’s premises would be picketed, but that the union was content that both the office employees and the operating engineers (who maintain the heating system) should freely cross the picket line. Neither the office employees nor the operating engineers are presently in a legal position to strike, and Greco made it clear that there was no intention to interfere with the services they provided. However, Greco was not prepared to make a similar concession in respect of Carling’s



subcontractors doing maintenance or repair on the company's existing equipment, or doing construction or installation of the company's new physical plant and equipment.

12. At about 7:30 a.m. on the first day of the lockout, union members began picketing Carling's premises. There were pickets at both gates. It is conceded that union officers have both authorized and engaged in that picketing. Construction workers have refused to cross the picket line and enter the north-west gate.

13. There can be little doubt about the purpose of the picketing or the union's motive. Greco testified that, from the union's point of view, the key issue in the labour dispute is technological change, automation, and a potential loss of jobs when the expansion programme is complete and the new equipment is "on stream". In his view, the installation of the high speed bottle line and the switch to the use of aluminum cans will seriously reduce the job opportunities available to the union's members unless the effects of these changes are met by compensating clauses in the collective agreement. The new equipment operates three times as fast as the machinery now in place, potentially allowing the company to meet production needs with far fewer employees. He makes this prediction based upon his own observation of the effects of the new equipment at other breweries, and his analysis of the experience in the American brewing industry. Bruce MacDonald disagrees with the union's pessimistic projection, but does not dispute that automation is the key issue in the dispute from the union's point of view. Nor did he deny the importance, from Carling's point of view, of getting the new production lines into operation. That is why at the bargaining table the union is insisting on a variety of job security measures (retraining, wage/work guarantees, etc.) to cushion employees from the impact of the new equipment, and that is why the union is picketing the construction gate.

14. There may have been some residual concerns about safety, but I am satisfied that a principal purpose of the picketing at the construction gate is to delay Carling's planned expansion programme and put economic pressure on Carling which hopes to bring the new productive capacity "on line" as quickly as possible in order to capture what it foresees will be a potentially lucrative market. Of course, both the process of automation and the union's concerns have been around for some time, but under our legislation, this is the only time that the union can lawfully exert economic pressure and the employer has an obligation to bargain about the job security issue (unlike the situation in the United States where there is a continuing duty to bargain and no statutory mid-contract strike prohibition). If the union cannot mobilize enough bargaining power within the legally permitted time frame, or if the issue becomes a *fait accompli*, the union will have "lost" and the employer will remain as unfettered as it was during the currency of the now expired collective agreement. It is against this background that one must weigh Greco's "noble gesture" of "permitting" the office workers to cross the picket line (as they may be legally obligated to do anyway). This is nothing more than a recognition of the law and the fact that their services do not matter very much in the context of this dispute. The services provided by the construction workers do matter, from a number of perspectives. The interruption of the expansion programme ties up capital and imposes costs on Carling not unlike those arising from its idle plant and equipment. It interferes with Carling's existing marketing strategy whereby it hopes to serve and expand its customer base. And it increases the union's leverage on the very issue which is the cause of concern at the bargaining table.

15. I am also satisfied (despite some equivocation on his part) that Greco knew full well that construction workers were unlikely to cross the picket line. He testified, in-chief, that there was no prearrangement with the building trades unions, but on cross-examination he conceded that, as a matter of trade union solidarity, he did not cross picket lines and he expected the

construction workers would hold the same view. They did. The effect of the picket line was to bring to a halt all construction, renovation and equipment installation associated with Carling's expansion programme.

16. On the other hand, before one dwells too deeply on the union's motivation, or the effect of picketing at the Carling premises, it must be remembered that picketing is *always* designed to put pressure on the struck employer in one way or another; and primary picketing, at the employees' work place is *always* intended to dissuade persons (delivery men, suppliers, customers, replacement workers, and so on) from entering the struck premises for business purposes. Economic pressure is the *raison d'être* of any strike or lockout. The disruption of the employer's business is an ingredient in the union's bargaining power as well as the catalyst for settlement. And quite apart from any question of picketing, entirely "neutral" suppliers, distributors, customers and employees will often be detrimentally affected by a work stoppage simply because they are accustomed to doing business with the struck employer and may have difficulty in continuing to do so. Their operations are functionally related in an economic sense, and they may suffer economically, even though, unlike the present case, their business premises or activities are unlikely to be geographically contiguous with those of the struck employer.

17. It must also be remembered that the applicants' presence on the Carling site is more than a mere accident of geography. They are supplying useful services to Carling, the immediate party to the labour dispute, at the very work place of the locked out employees. It is also a little difficult to say that those engaged in installing the equipment that the dispute is about, are wholly unconcerned. Both the applicants and Carling derive a distinct economic advantage from continuing their dealings, and in the case of Carling, a collective bargaining advantage too. The farther the automation progresses, the less likely the union will be able to influence its implementation. Both the applicants and Carling will continue to enjoy that advantage if the picketing is prohibited. Indeed, to the extent that the automation proceeds unhindered, the activities of the construction workers may be contributing to a much more tangible and serious loss of long-term, permanent work opportunities than would be the case if Carling chose to continue production through the use of management or replacement employees. That is certainly Greco's belief. I mention this because unless there is a qualitative and legally significant difference between the construction services (labour and materials) supplied by the applicants and their subcontractors, and the services supplied by, for example, a cartage company that chose to make deliveries for an employer during a lawful work stoppage, the cartage company could also claim to be a "neutral" immune from primary picketing of the employees' work site, so long as there was a separate delivery gate. One might also ask whether the functions performed by the applicants and their subcontractors at the site of the primary dispute are analytically different from those provided for Carling by outside contractors engaged to perform painting, electrical or mechanical repair, or to work on an annual overhaul of existing equipment. Or are these subcontractors also immune from picketing, provided the company establishes a separate "maintenance and repair" entrance? Counsel for the respondent put it this way: why shouldn't the union be entitled to give its message to *anyone* visiting the employees' work place for the purpose of doing business with Carling? In the circumstances of this case, what is so special about the applicants, that they should be immune from exposure to picketing at the employees own work place?

18. It is not disputed that the construction workers have declined to cross the picket line, and there is no doubt that in this jurisdiction, a concerted refusal to cross a picket line constitutes a strike. Since the construction workers in this case are bound by subsisting collective agreements, that strike is necessarily unlawful. The construction employers, should they so wish,

could seek from this Board a variety of remedies, vis-a-vis their own employees and unions. Those remedies include damages and/or a cease and desist direction to prevent the continuation of the unlawful strike. Such cease and desist directions have been granted — most recently by the present Vice-Chairman, when T.T.C. drivers refused to cross the picket lines of striking workers at various Eaton's stores in Toronto. (See *Toronto Transit Commission* [1984] OLRB Rep. Dec. 1781.) The question here, however, is *not* whether the construction contractors (and perhaps Carling as owner-client or in its capacity as general contractor) can require construction employees to go to work despite the picket line. The issue is whether the construction contractors can prevent the brewery workers from peacefully picketing parts of their own work site.

19. Before considering the propriety of the picketing per se, it is necessary to deal with two subsidiary "technical" arguments raised by counsel.

20. This application was brought under section 135 of the Act. Section 135 appears in the construction industry portion of the Statute. It pertains only to the construction industry. Its industrial equivalent is section 92, and it will be observed that section 135 is somewhat broader than section 92. Under section 135 relief is available to any "interested person". There is no equivalent wording in section 92. The difference is rooted in the realities of the construction industry.

21. On a construction site the work of a number of employers and their employees must be co-ordinated and integrated. Any unlawful strike will inevitably have "spill-over" effects on other employers — even if their own employees are not directly involved. Section 135 permits such "interested persons" (a general contractor, another subcontractor, or perhaps an owner-client) to seek relief against the *employees of some other employer* when an unlawful strike impinges on their operations.

22. But in the construction industry portion of the Act, the term "trade union" has a very specific meaning. It refers only to unions that according to established trade union practice pertain to the construction industry (see section 117(f)). The Brewery Workers Union does not meet that test. It is not a construction industry trade union. Accordingly, the applicants cannot seek relief under 135 against the Brewery Workers Union or its officials. It would appear, however, that such relief *can* be sought against "persons" who are picketing (including trade union officials in their personal capacity) and thereby causing an unlawful strike; moreover, as an employer, the applicant could seek similar relief against the picketers under section 92. The fact that section 135 does not apply to a non-construction union would not prevent the applicants from obtaining an order, pursuant to section 76 restricting "persons" from picketing, and that, of course, is their principal objective. Counsel for the union conceded that I could and should treat this application as being made simultaneously under both sections 92 and 135 for the purpose of dealing with the merits of the dispute.

23. The other argument involves the ambit of sections 92 and 135 following the recent amendment to those sections. The applicants submit that the amendments were intended to give the Board a wide ranging jurisdiction and discretion to regulate *any picketing*, even entirely lawful and peaceful primary picketing, where it leads to an unlawful strike by some employees of some employer. It is said, for example, that if the unionized truck drivers employed by a cartage company refused to cross the brewery workers' picket line, the Board would have jurisdiction, not just in respect of the strike, but also to limit the picketing. Of course, it would be a matter of discretion whether the Board would choose to do so, but the applicants argue



that the Board would have that option. The applicants assert that where a person is doing something which precipitates an unlawful strike, the Board's jurisdiction is much wider than that of the common law courts. Counsel for the union argues that the Legislature did not intend to extend the Board's substantive authority to restrict lawful primary picketing, and he questions whether the Legislature could properly confer upon the Board a broader jurisdiction than the superior courts. In counsel's submission, the powers asserted here extend well beyond anything contemplated by the Supreme Court of Canada in the *Tomko* case (see *Alex Tomko v. Labour Relations Board of Nova Scotia et al.* 76 CLLC ¶14,005), and he points out that the Board's authority is, in any event, circumscribed by section 76(2) of the Act.

24. It appears to me that the purpose of the statutory amendment was much more limited than the applicants suggest: it was to ensure that a particular cause of industrial conflict — picketing — could be channelled through the expedited procedures under sections 92 or 135 rather than the more cumbersome route under section 89 of the Act. That question was very much in doubt as sections 92 and 135 were formerly worded, because the language of those sections mirrored the language of sections 72 and 74, but did not “pick up” the language of section 76. If expedition is important in dealing with situations of industrial conflict (where the Board typically schedules a hearing within 24 to 48 hours), it is sensible that the Board should be able to deal with the cause of the strike as well as the strike itself. There is no obvious policy reason why the Board should be able to move quickly to deal with a union official who procures an unlawful strike but not a “person” who does the same thing; nor that the Board can deal with the threat of a strike, but not the threat to picket which, in many contexts, will inevitably lead to a strike. It seems to me that the effect of the amendment was more procedural than substantive; but even if I am wrong, and the regulation of picketing is treated solely as an exercise of discretion, section 76(2) cannot be ignored. Whether, as a limitation on discretion or jurisdiction, 76(2) is a clear expression of legislative policy which was not altered by the recent amendments to sections 92 and 135.

25. By its terms, section 76(1) prohibits the activities of individuals who cause an unlawful strike. But section 76(2) provides that the very same activities when done “in connection with a lawful strike or lockout” are not prohibited. In my view, it follows, that, *prima facie* at least, such activities should not be restrained. Insofar as section 74 is concerned, I adopt the approach enunciated by former Chairman G. W. Adams, Q.C. writing for the majority in *Consolidated-Bathurst Packaging Limited*, [1982] OLRB Rep. Sept. 1274 at paragraph 22:

22. Section 74 and 92 must be interpreted in the context of the other provisions of the statute and of industrial relations practices. Similarly, the Board's discretion under section 92 must be exercised in the light of these same considerations. It is from this perspective that the Board has said that section 74 must be read and applied with due regard to the legislative policy expressed in section 76. See *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207. Picketing is a traditional method employed by workers to publicize their employment disputes and to attract support. If section 74 was applied literally by this Board, picketing at their workplace by employees lawfully on strike would be restrained if honoured by other employees of the struck employer or by the employees of suppliers providing goods and services to the struck location. Section 76(1) is aimed more broadly and directly at picketing in that it applies to “persons” as opposed to trade union officials and requires only the finding that persons will engage in an unlawful strike as the probable and reasonable consequence of the picketing and not than an unlawful strike has occurred. However, by section 76(2) the Legislature has made it clear that it does not intend to restrain picketing done “in connection with a lawful strike”. In other words, accommodation is made for the traditional exercise of picketing conduct. This Board has therefore read section 74 in light of section 76(2) and declined to restrain, under either section 92 or 135, the involvement of union officials in picketing properly associated with a lawful

strike. This case, like *Sarnia Construction Association*, raises the issue of the scope of picketing envisaged and permitted under the Act. Is this picketing in connection with a lawful strike within the meaning of the Act?

Certainly it would be an odd result if picketing causing an unlawful strike by the employees of a second employer could be attacked if the picketers were union officials but not if the picketers were rank and file union members. (This possible anomaly could be resolved as the Board has done in *Consolidated-Bathurst* or by a reading of section 74, and section 76, which would confine the former section to actions by union officials vis-a-vis their own members and over whom they might be expected to have some influence — in effect reading the second part of section 74 to apply to the same “target group” as the opening words of the section.) The question then, is whether the picketing activity, which is the subject of this application and which has induced other employees to engage in an unlawful strike, falls within the saving provision of section 76(2).

26. It might be said that the issue in this case involves a simple interpretation of the words “in connection with” — and in a sense, this is so. But, of course, the underlying policy issue is much more difficult than that. The “simple question of interpretation” necessarily involves a recognition of the competing interests in issue.

27. When read as a whole, a principal theme of the *Labour Relations Act* is to confine and limit the exercise of economic pressure to specifically prescribed time periods. The sense of section 76 is that labour disputes should not be allowed to expand so as to enmesh *disinterested third parties* who might become the medium by which secondary pressure is exerted on the struck employer. But by the same token, the law envisages that a striking union is entitled to bring the employer’s operations to a standstill even when the application of that pressure adversely affects persons with whom the employer does business, and notwithstanding the fact that that party is not directly involved in the dispute. Striking employees are entitled to exert economic pressure which is economically damaging and disruptive. The law also recognizes the right of employees to picket at their ordinary place of work. These policy dilemmas and potentially competing considerations arise when the Board is called upon to determine the meaning of the words “in connection with” found in section 76(2) of the Act. For, like consanguinity, “connection” is a matter of degree. So is industrial relations neutrality.

28. These problems of interpretation are compounded in the circumstances of this case where there is a primary employer, Carling, with which the union has a legitimate dispute, and there are a number of other employers, the construction contractors, with which the union has no direct dispute, but who are economically connected with the primary employer in a contractual and economically advantageous relationship. This is not a case like *Consolidated-Bathurst, supra*, where a geographically remote and neutral competitor sought, without prearrangement, to capitalize on the woes of the struck employer, and service the needs of the struck employer’s usual customers. The construction contractors are not simply providing a service to Carling beneficial to themselves, but are obviously providing services directly advantageous to Carling’s short-term marketing objectives and immediate collective bargaining interests. And Carling, is not just a passive owner-client. It has chosen to act as its own general contractor, and is a direct party to the labour dispute.

29. Of course, cases such as the present one are not entirely novel. The same problems have frequently arisen in other jurisdictions where courts and labour boards have sought to grapple with the same competing policy concerns. Indeed, there is a rich and varied jurisprudence on the issue of common situs picketing, as well as a considerable body of scholarly

comment. [See, for example: R.M. Dereshinsky, A.D. Berkowitz, P.A. Miscima editors, *The NLRB and Secondary Boycotts* (1981) University of Pennsylvania (Industrial Research Unit) Labour Relations and Public Policy Series No. 4; R.M. Brown “*Picketing: Canadian Courts and the Labour Relations Board of British Columbia*” (1981) 31 University of Toronto Law Journal 153; D. M. Beatty, *Secondary Boycotts: a Functional Analysis* (1974) 52 Canadian Bar Review 388; J.A. Manwaring, *Secondary Picketing* [1982] 20 Osgoode Hall Law Journal. See also the contrasting views expressed by the various Vice-Chairmen of the B.C. Labour Board in *Dillingham Corp. (Canada) Ltd.* [1975] 1 Can. LRBR 129)]. One American commentator was prompted to write “common situs picketing is one of the most complex areas of secondary boycott law” and in *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, the court observed:

No cosmic principles announce the existence of secondary conduct, condemn it as evil or delimit its boundaries. These tasks were first undertaken by Judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labour relations has created no concept more illusive than that of “secondary conduct”; it has drawn no lines more arbitrary, tenuous and shifting than those separating “primary” from “secondary” activities.

30. Some of this jurisprudence supports the applicants’ position in whole or in part. Some supports the respondents’ position. Some merely points to the factors which must be elicited in evidence in order to trigger one or another of the purported positive “tests” for “essentially secondary” activity. However, I have expressly refrained from referring to any of this jurisprudence. None of these cases were referred to in argument — in large measure, no doubt, because of the speed with which this case was brought on — and one must recognize that the American and British Columbia experience arises in a different statutory context and regulatory environment. Moreover, the decisions are not entirely consistent with each other, nor within either jurisdiction are the decisions obviously consistent over time. The evolution of the American experience is particularly striking. Common situs picketing was initially totally unregulated, then substantially proscribed, then permitted in accordance with the parameters enunciated by the United States Supreme Court in *Local 761, International Union of Electrical Workers (General Electric)* (1961) 366 US 667. (c.f. the views expressed by the B.C. Board in *Dillingham, supra*, and in a somewhat similar case: *M.J.D. Construction Ltd.*, [1981] 1 Can. L.R.B.R. 492.)

31. I neither adopt nor reject the propositions or reasoning adopted in these cases from other jurisdictions. Rather, I prefer to leave these principles, tests, and approaches to a case, circumstances, and time, when they can be thoroughly argued. For this case, it is sufficient to consider only the decision of this Board in *Sarnia Construction Association*, [1982] OLRB Rep. June 922, since that is the case upon which the applicants primarily rely. When the situation there is compared with the circumstances in the instant case, it will be seen that there are some similarities, but also many real differences. The facts of *Sarnia Construction Association* are set out below.

32. In the spring of 1982, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (“the UA”) was engaged in collective bargaining on a province-wide basis on behalf of its employee members working in the industrial, commercial and institutional (ICI) sector of the construction industry. Those negotiations were conducted in accordance with the special legislative provisions applicable to ICI construction, which require province-wide bargaining by trade through designated employee and employer bargaining agencies. The immediate dispute was between the UA and



the local mechanical subcontractors. There was no dispute with the general contractors, the owner-clients or the other trade subcontractors. When the dispute reached an impasse, the UA called a lawful strike and one of its locals in Sarnia began picketing all of the sites where its members had been working prior to the strike. As a result, other craft employees refused to report to work as they were normally scheduled to do. However, the UA locals in Toronto and Hamilton (representing about half of the total membership engaged in the strike) were not picketing construction sites in their area because the practice there was that a project would not be picketed by the striking trade unless the work ordinarily performed by the strikers was being done by someone else. Thus, so long as the work opportunities of the strikers were being preserved, no picketing would take place — an approach which the Board noted “balances the interest of striking employees and others working on the same sites and has made an important contribution to labour relations stability in the area”.

33. In Sarnia, however, picketing was disrupting the work of other subcontractors, and the affected employers and employer associations sought a direction from the Board restricting the picketing. The Board granted the order subject to the proviso that: it would not apply to a construction project until one entrance to the project was established for strikers and another for the other employees; it would not apply to a construction project on which work ordinarily performed by strikers was being done; and it would not apply to a construction project where a UA official was denied access for the purpose of determining whether struck work was being performed. The Board’s reasoning is set out in a long passage to which I might usefully refer:

9. Sections 74 and 76 do deal with the concept of picketing but do not mention it specifically. See Laskin, *The Labour Relations Amendment Act*, 1960 (1961-62), 14 U.T.L.J. 116 at p.120. It is well recognized in this province that a picket line can cause an unlawful strike within the meaning of the Act. See *Nelson Crushed Stone*, [1977] OLRB Rep. Nov. 713. See also *Local 273, International Longshoremen’s Ass’n v. Maritime Employers’ Ass’n*, [1979] 1 S.C.R. 120 and Note, *Whether Honouring Picket Lines Constitutes a “Strike”* (1979), 11 *Ottawa Law Review* 771. There is no argument or evidence before us that the activity of those employees who recognized the respondent’s picket lines was anything other than concerted or based on a common understanding within the meaning of the legislation. We are therefore prepared to find that the actions of these craft employees constitute an unlawful strike within the meaning of the Act in that the procedural conditions precedent to calling a timely and otherwise lawful province-wide strike under the statute had not been complied with prior to the work refusals in question. It goes without saying that this finding is only for the purpose of this application. The application was not brought against such employees and there is therefore no need to decide whether our discretion under section 135 ought to be exercised with respect to them having regard to all of the industrial relations circumstances. See *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 at para. 15. This then raises the question of whether the respondent can rely upon section 76(2) by arguing that the picket lines are in connection with a lawful strike and therefore protected.

10. We are satisfied that sections 74 and 76 are designed to deal with, among other things, picketing aimed at employers and employees wholly unconnected with a lawful strike. On the other hand, subsection 2 of 76 is aimed at permitting, among other things, picketing arising out of and related to a lawful strike. Some integration and melding of purpose is therefore required in applying these various sections. Industrial relations experience has proven that neither purpose can be pursued to the exclusion of the other particularly in light of customs, practices and psychology surrounding the activity of picketing. Subsection 2 clearly protects, for example, picketing at a single employer location such as a plant or manufacturing setting where certain employees of that employer are on strike and picketing is aimed at fellow employees, suppliers, customers and others providing services to the struck enterprise. The Board has gone even further holding that picketing by employees on a lawful strike is permissible at locations of their employer other than the location at which they are employed. See *Canteen of Canada Limited*, *supra*, and *George*

*Wimpey (Canada) Limited*, *supra*. Whether or not this approach has been too sweeping in its terms we do not need to decide on the facts before us. The causes for picketing are almost infinite in variety as is the commercial activity which attracts picketing. Accordingly, *broad general pronouncements are not very appropriate*. See, for example, *Local 761, I.U.E. v. N.L.R.B.* (1961), 48 LRRM 2210; *Sailors' Union of the Pacific (Moore Drydock Co.)* (1950), 27 LRRM 1109; and Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388. The transfer of struck work from one location to another may present compelling reasons for expansive picketing whereas the picketing of another location involved in a totally different activity might have to stand or fall on the rationale that employees are entitled to picket an employer's entire economic domain. See *Williams v. Aristocratic Restaurants Ltd.*, [1951] S.C.R. 762; *Brown, Picketing: Canadian Courts and The Labour Relations Board of British Columbia* (1981), 31 U.T.L.J. 153. On the other hand, there can be little doubt that direct employee picketing of a geographically removed secondary employer's premises is not protected by section 76(2) subject possibly to considerations of a roving primary situs or ally considerations. See *Wescraft Manufacturing Ltd.*, [1975] 2 Can. LRB 324 and Paterson, *Union Secondary Conduct: A Comparative Study of the American and Ontario Positions* (1973), 8 U.B.C. Law Rev. 77 at 81. *While it may be that a clearly secondary and uninvolved employer can come before this Board for a direction to require his employees to cross the picket lines, such a remedy is not always entirely adequate particularly in relation to suppliers and others and we see little justification for placing the employees of a secondary employer in the dilemma of choosing between their loyalty to the labour movement and their legal obligations*. Section 76 was designed to remove the source of the problem, i.e. employee directed secondary picketing. See Arthurs, *Labour Law-Secondary Picketing-Per Se Illegality-Public Policy* (1963), 41 Can. Bar Rev. 573 at 584. It is only since the expansion of the Board's remedial authority that the problem has become one falling within the Board's responsibility. In this respect, we think the reliance on *Canteen of Canada Ltd.* in *Ford Motor Co. of Canada Ltd. v. Browning* (1978), 86 D.L.R. (3d) 579 at 581 was understandable but not warranted. Accordingly, *Canteen of Canada* must be read in light of the instant decision.

11. *Moreover, in the context of province-wide bargaining in the construction industry we are reluctant to hold that contractors working on a common construction site but otherwise unrelated to a dispute involving another trade also located there lose the protection provided for by sections 74 and 76(1). Nor, with the advent of province-wide bargaining, do we accept that section 76(2) permits unrestricted picketing directed at employees of employers unconnected with the labour relations dispute other than by geography provided that separate entrances can be established for such employees and provided further that the work of the striking trade or trades is not being performed*. In embarking in this direction the Board must be sensitive to the custom and practices of trade unions and to the psychology permeating labour relations conflict. However, *we see little justification for unrestricted common situs picketing in province-wide bargaining where the work of the striking employees is not being performed and the employers adversely affected are not connected with the negotiations*. Such employers are not party to the negotiations and can have no real control on bargaining postures. Picketing directed at such employees and employers is in every sense secondary and not connected with a lawful strike. Indeed, we note that Hamilton and Toronto locals do not see a need to picket other craft employees even of multi-trade contractors unless their work is being performed. Thus, in the circumstances of this case, and where the picketing, either physically or visually, was not limited to single trade mechanical contractors and the common employer multi-trade contractors, we find and declare that the officers of the respondent trade union intended to cause an unlawful strike of trades employees employed by employers who are not part of the mechanical trades negotiations and that, to the extent that the picketing is directed at and interfering with such employees, the picketing cannot be said to be in connection with a lawful strike. However, on the very limited facts before us, *we are not prepared to say that the multi-trade contractors involved in bargaining with the employee bargaining agency of the respondent local may also seek protection under section 74 and 76(1)*. While there may be additional detail and argument on how the construction industry is different than a normal industrial setting where various employee groups of a single employer are employed in proximity to each other and therefore properly subjected to picketing, we are

not prepared to distinguish the construction industry in this respect at this time. *This case should not be taken as a signal to parties outside the ambit of province-wide construction industry negotiations to begin establishing reserved gates in an effort to insulate themselves from primary picketing. This decision is very much centered on the needs and practices of a particular segment of the construction industry.*

[emphasis added]

34. In *Sarnia Construction Association*, the strike was not directed against either a general contractor or the owner-client of the site. The picketing was directed at other specialty subcontractors who were wholly unconcerned with the dispute, did not, by their actions contribute to the economic strength or bargaining position of the struck employers, and were in fact on the site only by accident of time and geography. Their activities did not affect the work opportunities of the striking workers, nor obviously assist the struck employers either economically or in their tactical ability to resist the strikers' demands. The work of the strikers remained undone, to be completed when the dispute was over. The purpose of picketing these neutrals was to put pressure on them and perhaps the general contractors to encourage the struck mechanical subcontractors to make concessions. It was a form of pressure which the Board considered "secondary" or unconnected with the direct dispute. However, the Board was careful to limit its opinion to the unique facts of the case and circumstances of the construction industry, and even reserved judgment on whether a multi-trade contractor (i.e. a firm with contractual relationships with various trade unions) could be picketed by one of those unions, thereby inducing the others to respect the picket line and engage in a work stoppage. The Board was not prepared to extend its analysis to a manufacturing setting where it was recognized that otherwise lawful primary picketing may be aimed at: "fellow employees, suppliers, customers, and *others providing services to the struck enterprise*". The Board was not prepared to qualify or undercut the general proposition (and understanding in this province) that, *prima facie*, at least, striking workers are entitled to picket the premises of their employer.

35. In the instant case the situation is quite different from that in *Sarnia Construction Association* even though the issue before the Board is the same: can the impugned picketing activity properly be said to be "*in connection with*" the lawful lockout currently imposed by Carling on the members of Local 325 of the Brewery Workers Union? I must conclude that it is. Indeed, I do not see how I could reach any other conclusion if the words "in connection with" are to be given their ordinary meaning. To adopt the applicants' submission that the picketing here is *not in connection with* the lockout, I would have to totally ignore the facts

36. The picketing here would not occur at all were it not for the existence of a lawful strike or lockout. The picketing is occurring at the locked out employees' own work site, not some geographically remote location of a neutral wholly unconcerned third party. All of the activities interfered with are of direct and immediate business benefit to Carling, and are being performed on its premises and for its benefit at the same time that Carling has locked out its own employees. In *Sarnia Construction Association* it was difficult to identify any benefit the struck contractors were deriving from the continuation of work by the "neutral" contractors, but that is certainly not the case here. On the face of it, Carling would appear to be as directly affected by a delay in the preparation of a profit-making addition as it is by the cessation of the production process. In both instances the loss suffered relates to the tying up of a capital investment and the prospective loss of custom. Why should one be subject to picketing and not the other when both are occurring at the employees' immediate work place? I find it difficult to distinguish the construction services here provided to Carling by the applicants, and the services supplied by suppliers or others who may have occasion to come to the location of the



work stoppage for purpose of doing business. These factors, in themselves, might be sufficient to warrant a refusal by this Board to interfere with the picketing. But those are certainly not the only facts in this case which would support that conclusion.

37. Carling is not a passive owner-client, but is acting as its own general contractor in respect of at least certain phases of the construction programme, with its own direct relationship with construction subcontractors, and, since December 1984, its own responsibility for the maintenance of safety standards and the rectification of safety problems arising from the construction work. The construction workers (including those employed by Carling's own direct subcontractors) are performing services for Carling at Carling's work site which are directly related not only to the issues raised in this particular strike, but also to the parties relative bargaining positions and the ability of Carling to meet its projected production and market requirements. In locking out the employees, Carling is denying its workers present work opportunities as it is lawfully entitled to do, but in proceeding with its automation programme Carling is also limiting its employees' ability to respond to that programme in bargaining, and may well be effectively influencing its employees' future work opportunities. One of the purposes of the picketing, and perhaps the main purpose of picketing the construction gate, is to interrupt a process which the union reasonably believes will substantially reduce the work opportunities available at the Carling plant. This is not a case like *Sarnia Construction Association* where the activities of the so-called neutral subcontractors do not bear upon the work opportunities of the struck employer or its immediate advantage in resisting the union's demands in the strike. As I have already noted, long-term job security is what the dispute is all about. In all of these circumstances, I do not see how this Board can sensibly say that the picketing is not "in connection with" the lockout, even though the picketing at the construction gate may well cause the employees of the construction contractors to breach their own legal obligation to work and induce them to engage in an unlawful work stoppage.

38. For the foregoing reasons, the Board is not persuaded that it should issue a direction prohibiting picketing at what the applicants describe as Carling's construction gate. It goes without saying that nothing in this decision should be construed as foreclosing any rights or remedies which Carling or the construction contractors may have in respect of any unlawful work stoppage, or any remedies in respect of the picketing which may be available in other forums. Nor should this decision be read as necessarily foreclosing any regulation of picketing at a common industrial work site. Whether as a matter of jurisdiction or discretion, I am simply not persuaded that, in the circumstances of this case, the prohibition sought by the applicants should be granted.

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**2174-83-U** Teamsters Local Union No. 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. **Brytor International**, Respondent

**Adjournment — Change in Working Conditions — Practice and Procedure — Unfair Labour Practice — Complaint adjourned *sine die* — Delay not disentitling revival within one year period — Whether unit employees denied work contrary to freeze provision — Board drawing adverse inference from employer's failure to adduce documentary evidence**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members I. M. Stamp and S. O'Flynn.

**APPEARANCES:** *D. McIlravey and R. Alberghetti for the complainant; D. Jane Forbes-Roberts, Bryan Atkinson and Ian Grant for the respondent.*

**DECISION OF THE BOARD;** March 11, 1985

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 64, 66 and 70. The complaint alleges that the employer has violated the freeze provisions of section 79 by denying work to employees in the bargaining unit and utilizing office and managerial personnel on work which was normally performed by bargaining unit employees after receiving a notice of the union's application for certification.

2. The respondent is an overseas moving company which, at all material times, operated in Hamilton, Ontario. In the fall of 1983, the company employed approximately 10 people. Four of these were drivers/packers who were covered by the application for certification filed by the union on October 27, 1983. On November 15, 1983 the union was certified as the bargaining agent for those four employees. The union processed this complaint on behalf of three of those employees, namely Messrs. Alberghetti, Martel and Fekete.

Preliminary Issue

3. On December 15, 1983, the union filed this complaint. On January 16, 1984, the Board issued a decision which reads:

Having regard to the agreement of the parties, the Board hereby consents to adjourn this complaint *sine die* for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.

In mid April of 1984, the employees began a lawful strike which has continued to date. On January 4, 1985, the union requested that the case be returned for a hearing before the Board. At the outset of this hearing, counsel for the respondent requested that the Board decline to entertain the complaint because of the "delay" in reactivating the proceedings or in pursuing the issue with the respondent. In response to this preliminary submission, the union argued that it had hoped to resolve the issues in this complaint in the negotiations for the first contract, rather than face litigation during negotiations. It was explained that the union reactivated the complaint at this time to ensure that it was within the period covered by the Board's decision of January 16, 1984.

4. On the preliminary issue, the Board rejected the respondent's request to decline to hear the case and ordered that the parties proceed with the hearing as scheduled. Because the parties had agreed to adjourn the complaint for one year and because the request to reactivate was filed within the one-year period covered by the initial Board decision, the union has every right to proceed as it wishes now. Further, no prejudice resulting from the delay was alleged by the respondent. Finally, the Board recognizes and encourages parties to make every effort possible to resolve matters on their own. When efforts to reach a mutual settlement within or outside of negotiations take place and no prejudice results by the delay in pressing through to litigation, there is no reason for the Board to refuse to hear the case while it is still within the one-year period allowed by the adjournment on consent.

### The Evidence

5. The Board heard one witness for each party. On behalf of the respondent, Mr. Brian Atkinson, the company president, testified. He described the nature of the business and said that their work was seasonal, requiring more employees in summer than in the winter months. Prior to the application for certification, he testified that the four packer/drivers whom he employed did most of the packing and driving work. But when they were busy, office or managerial staff "occasionally" assisted in the loading, unloading or packing at the warehouse or at the customers' residences. He claimed that there was no change in the manner of operations after the application for certification was received. He claimed that the men covered by the certificate were not denied work that they ordinarily would have done or that work was deflected to office personnel in any way that was unusual. It was admitted that others were hired to do some work. He claimed that the company suffered a "downturn" in business that necessitated that the employees would not be called in as often in the winter months following the application for certification. However, he claimed that this was no different than in previous years for the company. No documentary evidence was presented by the company.

6. Raoul Alberghetti testified on behalf of the complainant. He claimed that prior to the application for certification, he never suffered layoffs throughout the year and that the other employees were only not called in "on a very few days." However, in November of 1983 he claims that this situation changed. By mid November he testified that he only worked a couple of days per week, at the most. (He admits to being on holidays in December of 1983.) He provided pay slips which substantiated the fact that he worked very little from January to March of 1984. He says this was completely different than the years before during the same time period. He did not give the Board clear evidence as to how much, if any, the other two employees who were the subject of this complaint worked before or after the application for certification.

7. Mr. Alberghetti also testified that he drove past the company's warehouse daily to drop his wife off to work around the corner. On occasion, he stopped and observed the area for one to one and a half hours. At these times, he saw office and managerial staff loading and unloading containers and also saw other people doing this work. Some of these men were unknown to him and some were former part-time employees. Mr. Alberghetti also observed containers being delivered and loaded at the rail yards. All this occurred when none of the four employees covered by the application for certification were working. Finally, Mr. Alberghetti said that when he was called in for work, he noticed that containers had been moved in and out in his absence.



8. It should be noted that the complainant tried to adduce evidence that threats were made to the union and that changes in working conditions other than a denial of work opportunities took place after the application for certification. The complaint itself simply reads: "[The respondent] has denied work to employees of the bargaining unit at varying times and has utilized office and management personnel on work which was normally performed by bargaining unit employees." At the hearing, the Board advised the parties that it was not prepared to receive any evidence beyond the allegation that the respondent had denied work to employees of the bargaining unit. The Board advised the parties of its concern that the respondent is entitled to know the case that it is expected to meet prior to the hearing. The only allegation contained in the complaint was regarding an allegation of change of working conditions by denial of work opportunities. The Board requires some degree of specificity in making allegations and complaints to enable the respondents to prepare their defences. Thus, we ruled that it would be unfair to allow the complainant to go beyond the scope of its original complaint at this time. However, we were prepared to hear any and all evidence the union wished to adduce on the issue of denial of work opportunities following the application for certification.

### Decision

9. Section 79 of the Act requires employers to conduct their business as they have done in the past so that the certification process and any bargaining that may follow can take place in an atmosphere of stable terms and conditions of employment. As the Board has previously explained in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859:

The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

10. By virtue of section 89(5), the onus in a case such as this is, rests upon the respondent to satisfy the Board that it has not acted contrary to the Act. Section 89(5) casts an onus upon the respondent to demonstrate that its conduct was motivated by *bona fide* business considerations, and was not influenced, in whole or in part, by anti-union animus. See *Aluminart Products Limited*, [1983] OLRB Rep. March 309.

11. No explanation was given to this Board as to why the company did not produce documentary evidence to substantiate its claim that working conditions with regard to offering of work had remained the same after the application for certification was filed or that the company suffered a downturn in business coincidentally during that same period. The Board was put in a difficult position of having to resolve the issues in this case with evidence from the two opposing parties which was directly contradictory. The company records could have assisted in the resolution of this dilemma. The absence of such evidence on the very points of dispute in this case forces the Board to draw an adverse inference against the company.

12. Thus, the Board concludes that on the basis of the evidence presented, work that was normally available to members of the bargaining unit was denied after the application for certification was filed. It is clear to the Board that the company continued to operate after the application for certification was filed and the Board received no explanation why the company could not continue to offer the same amount of work to the men in the bargaining unit that they received in previous years. Further, the uncontradicted evidence is that managerial and office staff were utilized to do the work normally performed by members of the bargaining unit at times when those employees were not themselves working. This amounts to a change in the working conditions during the statutory freeze period and thus amounts to a violation of section 89 of the Act.

13. The three employees on whose behalf this complaint was conducted are entitled to receive compensation for any wages and benefits they lost from being denied work that was available to be done and which would have normally been made available to them from the time of the application for certification, being October 27, 1983, to the time of the strike, being April 23, 1984. In view of the time that has elapsed since the complaint was first filed, no other relief is appropriate at this time.

14. The Board shall remain seized with the complaint in the event that the parties require assistance with the implementation of the award.

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**1887-84-U** Mohamed El Sherif, Complainant, v. **C. E. Jamieson & Co. (Dominion) Limited**, Respondent, v. Energy and Chemical Workers Union, Intervener

**Discharge for Union Activity — Practice and Procedure — Settlement — Unfair Labour Practice — Witness — Discharged employee seeking Ministry assistance — Accepting pay in lieu of notice and signing release of all further classes — Whether subsequent complaint before the Board barred — Board not exercising discretion to hear complaint — Employment Standards Officer not compellable witness**

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

**APPEARANCES:** *Mark R. Steffes and Amita M. Sud for the complainant; D. S. Jovanovic and A. Fantin for the respondent; Daniel Ublansky for the intervener.*

**DECISION OF THE BOARD;** March 7, 1985

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which the complainant, Mohamed El Sherif, has alleged that his employer, the respondent C. E. Jamieson & Co. (Dominion) Limited, has violated sections 64, 66 and 71 of the Act by discharging the complainant from his employment. By way of relief, the complainant seeks to be reinstated in his employment and to be compensated for all lost wages, benefits and gratuities, including interest thereon.

2. Sherif alleges that he was discharged on or about May 25, 1984 because of his involvement with the intervener Energy and Chemical Workers Union ("the union") following its certification by this Board, but before the union had completed a collective agreement with the employer. The complaint as filed states that Sherif approached the union but the union failed to file a grievance on his behalf. The complaint states further: "On or about June 25, 1984, the Complainant signed a final Release without independent legal advice and without being informed of its contents. The Complainant through economic duress was left with no alternative but to execute the Release in order to obtain badly needed funds without knowledge that it was a Release". It is unclear on the face of the complaint whether the word "grievance" is used in the sense of a grievance under a collective agreement or whether it has been used in the sense of a complaint filed under the Act. In any event, it is obvious that the union, whether asked to file a complaint or not, is not the complainant in this action. It did file an intervention and was represented by counsel throughout the proceedings. Counsel chose not to lead any evidence directly or through cross-examination of witnesses and made no representations on the evidence.

3. The respondent filed a reply to the complaint and in schedule "A" made written submissions which read in part as follows:

"7. Discussions concerning the termination of the Complainant's employment took place between the solicitor for the Respondent and a representative of the Ministry of Labour, Employment Standards Branch, on the 21st and 22nd day of June, 1984.

8. The solicitor for the Respondent was informed by the Ministry of Labour representative on the 22nd day of June, 1984, that the Complainant was prepared to settle the matter of the termination of his employment with the Respondent by signing a full and final release in return for an amount equivalent to two weeks pay.

9. The Complainant attended at the offices of the solicitor for the Respondent on the 25th day of June, 1984, and accepted a cheque for the agreed upon settlement and signed a release as he had been advised to do by the Ministry of Labour representative and was given a copy of the said release at that time.

10. The Respondent states that the Complainant was fully aware of the contents and effect of the release prior to executing the same. A copy of the release is attached hereto.

11. The Respondent denies the allegations of economic duress as set out in the Complaint."

The written submissions conclude with the following statement:

"16. The Respondent therefore submits that this Complaint ought to be prima facie dismissed by reason of a settlement having been reached by the parties, or, in the alternative, ought to be dismissed on the merits."

4. The complaint was filed October 16, 1984 and was first listed to be heard on November 28, 1984. It was adjourned without hearing on consent of the parties and came on for hearing on January 14, 1985. At the commencement of the hearing, the parties advised the Board that they had agreed that the Board should deal with the single issue of the effect of the alleged release on the processing of the complaint. Accordingly, this decision deals with that single issue.

5. The Board heard the testimony of Sherif, Ken Pessa and James N. Bartlet, Q.C. Pessa is a former employee of the employer who was discharged at the same time as Sherif. The Board does not have before it the testimony of the Employment Standards Officer who was the



Ministry of Labour representative referred to in schedule "A" of the employer's reply. The officer was present at the hearing and employer counsel sought to have the officer testify after Bartlet's examination had been completed. The Board heard the submissions of counsel for Sherif and the employer respecting whether the officer was a competent or compellable witness having regard to section 45(3) of the *Employment Standards Act*. Intervener counsel made no submissions. Section 45(3) of the *Employment Standards Act* provides as follows:

"No employment standards officer is a competent or compellable witness in a civil suit or proceeding respecting any information, material or statements acquired, furnished, obtained, made or received under the powers conferred under this Act except for the purposes of carrying out his duties under this Act."

The Board adjourned to consider the submissions of counsel and, for brief reasons given orally in the hearing, it ruled that the officer had been acting on behalf of Sherif in dealing with a complaint alleging that he had been discharged without notice contrary to the *Employment Standards Act*. Thus, the officer was acting pursuant to powers conferred under that Act and was entitled to the protection of section 45(3). Accordingly, the Board declined to compel the officer to testify in the proceedings.

6. The following facts are not in dispute:

(1) Sherif was employed by the employer as a laboratory chemist from April 24, 1981 to May 25, 1984. He was discharged effective May 25, 1984 by means of a letter to that effect from his employer bearing that date.

(2) On the same day that he received the letter, Sherif took it to the Windsor office of the Employment Standards Branch of the Ministry of Labour and complained about his discharge. An Employment Standards Officer intervened on Sherif's behalf with the employer.

(3) As a result of the officer's intervention, the employer instructed its solicitors to contact the officer. James N. Bartlet, Q.C., a senior partner of the employer's solicitors, subsequently engaged in several telephone conversations with the officer. As a consequence of those conversations, Bartlet arranged through the officer to have the complainant attend at the solicitors' offices on Monday, June 25, 1984. In anticipation of that appointment, the employer prepared a cheque payable to Sherif for a sum of money agreed upon by Bartlet, on behalf of the employer, and the officer. A release for the payment of that same sum of money and a letter on the employer's letterhead were also prepared. The letter bears the date June 22, 1984, is addressed to whom it may concern and states: "Mr. Mohamed El Sherif was employed as a laboratory chemist from April 24, 1981 to May 25, 1984".

(4) The complainant came to the solicitors' offices as arranged, received the cheque and the letter, signed the release and received a copy of it. He did not read the release before signing.

(5) The release, and consideration of the payment of \$443.28, which represents the payment of a sum of \$520.00 less statutory deductions for Canada Pension Plan and Federal Income Tax purports to: "... release and forever discharge C. E. JAMIESON & CO. (DOMINION) LIMITED, its succes-

sors and assigns, from any and all actions, causes of actions, claims and demands, for damages, loss or injury, howsoever arising, which heretofore may have been or may hereafter be sustained by me for or by reason of any cause, matter or thing existing up to the date hereof, and more particularly, without limiting the generality of the foregoing, with respect to any claim relating to my employment by C. E. Jamieson & Co. (Dominion) Limited, and the termination thereof.”

7. The Board also makes the following findings of fact from the testimony of Sherif, Pessa and Bartlet having regard to their recollection of the events about which they were testifying, the firmness of their recall, their ability to relate clearly to the Board the events and matters about which they were testifying, their ability to resist the influence of self-interest, and their general demeanour as witnesses.

8. When Bartlet contacted the Employment Standards Officer, he was advised by the officer that, in the officer’s opinion, the employer’s discharge letter did not reveal cause for discharge which would extinguish the employer’s obligation under the *Employment Standards Act* to give Sherif two weeks notice of his termination, or pay in lieu thereof. As a result of this and subsequent conversations with the officer, Bartlet obtained from the employer detailed sums of payment respecting two weeks salary, the vacation pay thereon, the statutory deductions to be made, and supplied this information to the officer. It was Bartlet’s understanding from these conversations that Sherif was prepared to accept these payments and the letter from his employer respecting the duration of his employment as full discharge of any claims against the employer. Bartlet understood further that Sherif was prepared to sign a full and final release on receipt of these items. It was this understanding which caused him to have the employer prepare the cheque and letter for him, to have the release prepared, and to make the arrangements with the officer to have Sherif come to Bartlet’s offices.

9. Sherif kept the appointment on June 25th. When he met with Bartlet he was shown the cheque and the letter, and given the opportunity to check them over. He indicated to Bartlet that they were satisfactory. Next Bartlet showed him the release. Sherif indicated twice to Bartlet that he was prepared to sign the release. Bartlet cautioned Sherif twice that it was a final release of all claims against the employer. With the first caution, he told Sherif that he wanted him to read the release before signing it. The second one was given after Sherif had appeared to glance briefly at the release and repeated his query of where he should sign it. This time Bartlet told him that he would have no further claim against the employer once he signed the release. Bartlet’s caution to Sherif did not go so far as to volunteer a detailed explanation of the wording of the release. The Board is satisfied on the evidence of both Sherif and Bartlet that Sherif signed the release without first reading it. After he did so, Sherif was given a copy of the release together with the cheque and letter, at which time the meeting ended and he left.

10. Sherif denied that he had asked the officer to obtain for him the letter about the duration of his employment, that the officer had told him he would have to sign the release of all claims against the employer or that he had told the officer that he was prepared to sign a full and final release. In fact, throughout his cross-examination, Sherif insisted that he thought he was merely signing a receipt for two weeks pay when he signed the release. At the very end of his cross-examination, he admitted knowing that he was going to have to sign a release in order to obtain the payment. He denied knowledge that it would be a complete release of all claims against the employer.

11. Counsel for Sherif argues that there are several grounds for setting aside the release insofar as it might be seen by the Board as a bar to inquiring into the present complaint. These grounds are that Sherif was clearly entitled pursuant to the *Employment Standards Act* to the payment received and was under no obligation to sign a release of any kind in order to receive it; that he did not have independent legal advice before signing the release; that it is reasonable to conclude that in his circumstances, being without employment income and wishing to bring separate suit for unlawful discharge, Sherif's release against all claims in consideration of the sum paid is not reasonable, and that he would have received such advice from independent legal counsel; that his circumstances made him economically subservient to the employer; and that his lack of independent legal advice coupled with his poor understanding of English created an unequal bargaining position. Counsel argued that the Board, on the evidence before it, could characterize Sherif's situation in two ways: either his knowledge of English was inadequate and he was incapable of understanding both Bartlet's instructions to read the release, and the consequences of signing the release and, as a result he believed he was merely signing a receipt for the cheque; or he failed to understand the gravity of Bartlet's caution, because Bartlet simply cautioned him to read the release and failed to explain that the release would bar any further claim against the employer. In other words, Sherif failed to understand that the release might affect any other claims he wanted to pursue against the employer. Furthermore, counsel argued, Sherif had been instructed by the Employment Standards Officer to go to Bartlet's office in order to collect the money in question and he went there for that single purpose, unprepared for the situation which confronted him. On these grounds, counsel argued that the Board should set aside the release insofar as it purports to have any effect other than to bar him from claiming the same payment again.

12. Sherif's counsel cited a number of cases where the Courts, in civil suits dealing with releases, have set aside a release, wholly or in part. Counsel is not relying on the cases for their facts, which he acknowledged might well be distinguishable from the facts before the Board. Rather, he relies on them to show what factors the Courts have considered when dealing with releases.

13. The question of what effect, if any, the release has on this complaint raises, as the Board sees it, an issue of whether the Board's discretion under section 89(4) of the Act should be exercised. The Board is without jurisdiction to set the release aside either wholly or in part. Section 89(4) states as follows:

"Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;  
or



(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally."

The Board is not possessed of the Court's equitable jurisdiction. Our discretion to hear a complaint, however, empowers us to ignore the release insofar as it purports to enjoin Sherif from proceeding with this complaint. The question is whether this discretion should be exercised with the Court's equitable principles in mind.

14. The Board has in past upheld a release as a bar to a complaint. In *Empire Public House* [1973] OLRB Rep. April 181, the Board upheld a release as barring an unfair labour practice complaint, noting that the complainant had not been misled in signing; the employer had not exercised undue influence; and the complainant was fully aware of the consequences of his actions. It is not clear from the decision which, if any, of the factors was of the greatest importance. It is clear from the cases cited to us, however, that the Courts have been concerned with the equality of bargaining power. The Courts appear to have been unwilling to uphold similar such agreements where the dominant party has taken advantage of its position to extract favourable terms.

15. The bargaining relationship between employer and employee is an inherently unequal one. The Act is geared toward redressing this imbalance, and this is a relevant factor for the Board to consider in determining whether to exercise its discretion to hear a complaint. Therefore, the Board thinks it appropriate to ask whether it is reasonable to refuse to hear Sherif's complaint because of the release which he signed in the circumstances in evidence here.

16. The evidence establishes that the release came about through Sherif's efforts when he contacted Employment Standards immediately upon his termination. When, as a result of that contact, the Employment Standards Officer intervened with the employer on Sherif's behalf to press a claim for termination pay in lieu of notice, the officer's several conversations with Bartlet led to the employer making an offer to Sherif of two weeks' pay in return for Sherif's full and complete release of any further claims. The employer's offer was conveyed by Bartlet to the officer. The Board has no reason whatsoever to disbelieve Bartlet's evidence that the officer told him Sherif had agreed to sign the release in return for the two weeks' pay and the letter. What the Board does not know is whether the officer told Sherif the conditions attached to the payment and obtained Sherif's acceptance of those conditions. The Board has no doubt, however, that Sherif knew and understood why he was going to see Bartlet and that he would have to sign a release before he would receive the cheque for two weeks' pay. The Board finds, therefore, that Sherif knew and understood prior to meeting Bartlet what the purpose of the meeting was, in other words, to sign a release as a condition of receiving the cheque for two weeks' pay. Since he was not represented by counsel during the negotiations over the payment or at the final meeting with Bartlet, it is relevant to ask whether he understood the effects of his actions.

17. The Board had the opportunity to observe Sherif as he testified and, based on his demeanour and his evidence, the Board has no difficulty in concluding that he is sufficiently proficient in understanding written and spoken English to have been able to read and understand the release when it was presented to him and to understand what Bartlet said to him. The Board does not accept his testimony that he did not read it because he thought he was merely signing a receipt for the cheque. For reasons not revealed to the Board, even though Sherif had been

duly cautioned by Bartlet that he would have no further cause of action against the employer once he signed the release, Sherif signed the release without reading it. Had he taken heed from Bartlet's caution and read the release before signing it, the Board is satisfied that, as a minimum, he would have understood that he was agreeing to release C. E. Jamieson & Co. (Dominion) Limited from "... any and all ... claims and demands, for damages, ... with respect to any claim relating to my employment".

18. The above finding does not determine the present issue, however. The employer's conduct is equally relevant because of the unequal nature of the bargaining relationship. In the circumstances of this case, however, the Board does not find that the employer has taken advantage of its superior bargaining position. It simply responded to Sherif's initiative and settled the matter. He received two weeks' pay where he might have received none had the employer refused and successfully advanced the defense that he had been fired for reasons which did not require the employer to give notice of termination or pay in lieu thereof. The agreement is not, *prima facie*, an unfair one. It was executed nearly four months prior to Sherif's decision to file the instant complaint. There is neither any allegation nor any evidence before the Board that the employer intended to preclude the complaint. It is true that Bartlet could have gone further; he could have read and explained the release to Sherif. Nevertheless, in all the circumstances, the Board is of the view that Sherif was not treated unfairly in that he did understand from Bartlet's caution that he would have no further claim against the employer once he signed the release. Therefore, the Board is satisfied that Sherif understood the document to be a release from all actions arising out of his employment with the employer. Furthermore, he would have had the same understanding of its effect had he read the release before signing it. He cannot now take advantage of his failure to read it. Therefore, it is reasonable for the Board to refuse to hear Sherif's complaint because of the release.

19. For all of the foregoing reasons, we decline to exercise our discretion to hear the complaint. The complaint is, accordingly, dismissed.

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**0275-84-R** London & District Service Workers' Union, Local 220, Complainant, v. **Caessant Care Nursing Home of Canada Limited**, Respondent

**Bargaining Unit — Representation Vote — Sale of a Business — Vote directed after sale of business and intermingling of employees — Board determining bargaining unit and voting constituency — Setting out staffing model for employer to restaff new facility in accordance with agreement — Predecessor's collective agreement applying to entire nursing home if union successful in vote**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. Murray and L. C. Collins.

**DECISION OF THE BOARD;** March 14, 1985

1. This is the continuation of a successorship application filed under section 63 of the Act, the unfair labour practice aspects of these consolidated proceedings having previously been dismissed by the Board.
2. The Board in its decision of August 24, 1984, (see, [1984] OLRB Rep. Aug. 1060) determined that there had been a "sale of a business", represented by a 75-bed nursing home licence for the City of St. Thomas, from the operators of Willson Nursing Home to the respondent Caessant Care Nursing Home of Canada Limited, and that the applicant's collective agreement with Willson continued to apply to that business. Because employees of that business came to be "intermingled" at the new facility in St. Thomas with employees of a business owned by the respondent itself, in the form of an independent 41-bed nursing home licence for the City of St. Thomas, the Board directed the taking of a representation vote, in order to determine the question of union representation (and the applicability of the terms and conditions of the "Willson" collective agreement) for all affected employees in a uniform way. The problem with proceeding to take that vote, however, was the acknowledgment by the respondent that the new facility was not presently being staffed or operated in accordance with the terms of the Willson agreement. The parties were therefore directed to attempt to resolve between themselves in a reasonable fashion an appropriate model for "re-staffing" the new facility in a manner that would not be inconsistent with the terms and conditions of the collective agreement. Offers of employment could then be made to the former Willson employees improperly laid off at the time of the closing of the Willson Nursing Home, and a voters' list constructed on the basis of those individuals, together with the appropriate number of existing Caessant Care employees, who accepted employment at the new facility.
3. The parties have, however, been unable to come to terms on their own as to what an appropriate re-staffing model for Willson would be. The Board accordingly has no alternative but to fix that model itself, although in doing so, it must be recognized that a certain degree of arbitrariness will now be unavoidable.
4. Prior to considering the staffing model, however, the issue of the scope of the voting constituency must first be addressed. The new facility includes a 40-bed Rest Home, and it was the consensus at the initial hearing before the Board that all employees of the new Home, including the Rest Home, would be entitled ultimately to vote, so that the question of union representation could be decided "across the board". The respondent did not agree, however, that that was the appropriate *bargaining unit*, and reserved its right to make representations on that point after the result of any vote was known. At the hearing held to determine the present



issues, the applicant reiterated its view that an "all employee" bargaining unit would be the appropriate one, especially if the Board were to hold the vote itself on that basis. If not, the applicant suggested, the vote should be conducted on a piecemeal basis, in line with the ultimate bargaining structure envisaged by the Board for the Home.

5. After discussion in the hearing, the respondent took the position that the Nursing Home and the Rest Home should be separated for the purpose of union representation, as well as the full-time and part-time employees in each. The applicant continued to maintain its position that one bargaining unit and one vote was appropriate for this facility.

6. Upon consideration of the positions put forward by the parties, and the dispute over what would ultimately be appropriate as a bargaining unit, it is the view of the majority of the Board that no compelling reason exists for sweeping the Rest Home employees into the question of union representation which, as a result of the Board's finding of a "sale" of the "Willson" nursing home business, must be determined for employees of the integrated Nursing Home. No such integration or "intermingling" of employees exists for the Rest Home portion of the facility, and the operation of that aspect of the enterprise is not regulated or controlled by the provisions of the Nursing Homes Act. "Guest attendants" in the Rest Home are not interchanged with "Nurse's Aides" in the Nursing Home; the only commonality of staff employed between the two is with respect to three part-time activity directors, who share their time between the two operations. The respondent's own collective bargaining history, in particular, reveals a pattern of separate bargaining units for the Nursing versus the Rest Homes, at each of the other locations in the province where that is applicable. It is the decision of the Board, therefore, to confine the representation vote arising from the sale of the Willson Nursing Home licence to the Nursing Home portion of the respondent's St. Thomas facility. On the other hand, the Board notes that the collective agreement flowing from Willson, while making reference to the initial certificates for both a full-time and a part-time unit, now combines the two units under one collective agreement. It is the decision of the Board, therefore, that a single collective agreement (and bargaining structure) shall continue to apply after the vote to both full-time and part-time employees of the nursing home portion, unless the parties mutually agree otherwise.

7. The first step in arriving at a Voters' List is to identify that portion of the work in the new Nursing Home fairly allocable to the "business" transferred from Willson, as opposed to that acquired through Caressant Care's own licensed operation. There are 110 Nursing Home beds occupied at the present time, which is the relevant date for the purposes of the issue before the Board: i.e. the immediate re-staffing of the Home for the purpose of arriving at a Voters' List and thus completing the "sale" application before the Board. We recognize that the occupancy level has not been that high throughout the full period of the operation of the new Home, but that is a factor going to the assessment of damages payable under the collective agreement, and not an issue with which this Board is directly concerned. Of the present 110 occupied beds, the most Caressant Care itself can claim "credit" for is 41 beds, the maximum allowed to it under the licence which it obtained on its own from the Ministry. We are prepared to allocate the full 41 beds to the respondent's licence on that basis, leaving 69 resident beds attributable to the 75-bed Willson Nursing Home licence. Those 69 beds represent 63 per cent of the present occupancy level of the new facility.

8. There was at the point of closing out the Willson Nursing Home, some 62 or 63 beds occupied. The weekly "nursing" hours required to service those beds was 603. With the variations in design and economies of scale in the *new* Home, however, the total nursing hours

(i.e. for Nurse's Aides) required to service the entire 110 beds occupied is now 803 hours per week. All of those hours are, for the reasons set out in the earlier Board decision, presently scheduled on a part-time basis, with an average of 18 3/4 hours per week for each employee. Notwithstanding its submissions to the board in the earlier hearing, the Willson agreement do not prevent its conversion of the Home to a *totally* part-time basis. Once again, a majority of the Board do not agree. The "Hours of Work" provisions of the collective agreement provide:

- 10.01 The normal work day shall consist of eight hours including thirty minutes allowed for lunch, such lunch periods to be determined between the Employer and the employees.
- 10.02 The regular work period will consist of 80 hours which may be averaged over a two week period. It is understood that employees may be required to work up to and including seven consecutive days, any excessive days being subject to agreement between the Employer and the employee or employees involved.
- 10.03 Subject to paragraph 10.06 (b), overtime at the rate of one and one-half (1 1/2) times and employee's regular hourly rate will be paid for all time worked in excess of the regular work period referred to in paragraph 10.01 and 10.02 above. The Employer may request an employee to work overtime at any time prior to the shift in which overtime hours will be accumulated, and the employee has the option to accept or refuse such overtime. Time off work due to paid holidays which are paid in accordance with the provisions of Article 11 shall not be considered as time worked for the purpose of calculating overtime.

We recognize that Articles 10.01 and 10.02 have, as a major purpose, the setting of a base from which overtime is to be calculated and paid under Article 10.03, and do not constitute a "guarantee" of hours of work each week. On the other hand, we find that the use of the words "normal" and "regular" do provide some outside limits on the extent to which an employer can unilaterally re-structure his entire method of operation during the term of a collective agreement (or the extension of the agreement's provisions by statute). We find that the arbitration award in *City of Nanaimo*, (1982) 7 L.A.C. (3d) 245, cited by the applicant, aptly sets out the jurisprudence on this issue, to the effect that (at page 256):

"... a statement of 'normal' hours will not be offended by a scheduling of abnormal hours; a change to a new schedule of normal hours is, however, not permitted".

Whatever flexibility remained open to the respondent under the Management's Rights clause of the collective agreement, therefore, did not extend so far as to permit it to convert the "Willson" portion of its new Home to a schedule made up totally of part-time hours.

9. We do not, however, accept the position of the union in this matter either, that Article 9.02 of the Willson agreement means that all employees on the "full-time" seniority list at Willson must now be offered full-time work at the new facility, prior to any part-time work being scheduled. Article 9.02 provides:

In case of lay-off and recall, seniority shall apply provided the employees concerned can perform the normal requirements of the job. Under no circumstances will casual, new or part time employees be continuously employed on the job while any senior full-time employee is on lay-off. Such senior employees on lay-off will be given the first opportunity to accept casual, part time or new positions.

This, in our view, is not essentially a "scheduling" clause, but rather a "seniority" clause, as

is borne out by both its language and its context (in the “seniority” article). Indeed, the prohibition against the use of part-time employees in sentence 2 is not in terms of *any* full-time employees being on lay-off, but rather of *senior* full-time employees being on lay-off. And we note, in this regard, that a number of employees on the part-time list have a higher seniority date than some of the employees on the full-time list.

10. Nor do we accept the submission of the applicant that the “part-time” seniority list represents a kind of “on-call” list of employees, to be slotted in on a replacement basis as needed. The evidence of the final 10 weeks of scheduling at Willson itself does not support that. Rather, the “part-time” hours, just like the full-time hours, make up a regular part of the weekly schedule, and are, like the full-time hours, scheduled and posted in advance. We note, for example, that all of the Nurse’s Aides appearing on the “part-time” seniority list as of that point in time were scheduled for regular hours in each of the 10 weeks of scheduling filed with the Board.

11. The evidence discloses, in other words, that a “mix” of full-time and part-time hours were used in the scheduling of nursing hours at the Willson Home, and that mix, from the schedules filed, was virtually without exception in the ratio of 1.1 full-time employees to 1 part-time. For the purpose, therefore, of adopting an arbitrary staffing model, as we must, to provide the parties with guidelines for carrying out the “re-staffing” which now must take place in the Willson portion of the new facility, we adopt a scheduling ratio to be put into effect, at least for the present re-staffing purposes, of 1.1 full-time to 1 part-time Nurses’ Aides.

12. The final issue affecting the composition of the bargaining unit or voting constituency is the inclusion or exclusion of “bed-makers” and “activity directors”. The “bed-makers” are students hired at the new facility to come in from 6:30 to 8:30 every morning to make beds, on their way to school. No such concept existed at the Willson Nursing Home. It is the view of a majority of the Board, once again, that the students employed in this limited capacity are distinct in their nature and interests from other “part-time” employees or even “students employed during the school vacation period” at the Home. *So long as their use does not increase from the current level of 70 hours a week*, therefore (other than in proportion to an increase in the number of occupied beds in the Home), we are content to leave the respondent with the flexibility of having these student bed-makers excluded from the bargaining unit. We recognize, however, that these bed-makers are performing work which at Willson was part of the bargaining unit, and in granting the employer’s request, we consider it necessary to compensate the former Willson employees for the corresponding loss of work opportunities occasioned by the removal of *all* of the bed-makers from the unit. The information that we have is that the work of the current 10 bed-makers would translate into an additional 3-plus Nurse’s Aides if the work was done on the latter basis. Relating that figure to the 43 Nurse’s Aides presently employed to staff the Nursing Home, we find that the use of bed-makers represents the potential of an additional 7 per cent of the bargaining unit. We therefore grant the employer’s request for the exclusion of bed-makers on the basis of increasing the “Willson” portion of the Nurse’s Aide positions from 63 to 70 per cent of the total complement. The job of activity director, on the other hand, was one that existed within the bargaining unit at Willson, and no grounds have now been made out for its exclusion.

13. In sum, then, we find that the Nursing Home portion of the new facility now requires 803 Nurse’s Aide hours per week to run. Seventy per cent of those hours (i.e. 562 hours) are allocable to the work coming from the Willson Nursing Home, and are to be scheduled for staffing purposes on a ratio of approximately 1.1 full-time to part-time employees. This staffing



is to be done on a priority basis from amongst the employees on the full-time and part-time Willson seniority lists filed with the Board. The parties have agreed that this will be carried out by proceeding through the Willson seniority lists to offer whatever jobs are available to first the employees on the "full-time" seniority list, and then to the employees on the "part-time" seniority list. Any "full-time" jobs not filled from the "full-time" list would of course be offered to the employees on the "part-time" list; and, on the other hand, any of the jobs in the Willson portion of the Home not able to be filled from the available qualified staff on the two lists together would be open to be filled by the respondent Caressant Care through its own resources.

14. The remaining Nursing Aide hours ( $803 - 562 = 241$ ) are fairly allocable to Caressant Care's own portion of the Nursing Home, and will continue for the purposes of the Board's vote to be staffed in the same manner as at present, with employees averaging roughly 18 3/4 hours per week on a bi-weekly basis. Similarly, 2 of the 3 activity director positions are to be offered to any qualified "Willson" employees, on the basis of their seniority. When the "re-staffing" has been completed on this basis, and those employees who elect to accept the respondent's offer have demonstrated the firmness of that acceptance by commencing employment at the Home, the Board, through its officer, can proceed to make arrangements for the vote. Given the fact that the Board's "sale" finding in August of last year means that the qualified Willson employees should have been employed at the new facility, depending on their seniority, by as early as July 1983, and the Board's concern that the representation vote be determined by employees having a genuine commitment to continued work at the new Home, the Board is not persuaded to defer the re-instatement of entitled Willson employees, with the escalating cost to the respondent that that carries with it, until after, as the respondent has requested, the representation vote has been conducted. Rather, the respondent is directed to proceed with the actual re-staffing of the Home, in accordance with the scheduling parameters set by the Board, without further delay.

15. Clearly all Willson employees still on the seniority list who accept employment in the "Willson" portion of the new Home do so on the basis of the terms and conditions of the Willson collective agreement, with no break in seniority or service credits under that agreement. That is not in dispute. The respondent raises a question, however, whether any obligation still exists to offer employment to former Willson employees who had come to work at the new facility and then quit. In the view of the Board, since such persons were at no time offered employment in accordance with the terms and conditions they were entitled to under the Willson agreement, they are still entitled to an offer of employment that *is* in accordance with the collective agreement, at least for the purposes of the issues before this Board.

16. The respondent also argues that the Board, because of the onerous nature of the collective agreement, should exercise its power under section 63(6)(a) to declare that the Willson collective agreement no longer is binding upon the respondent even if the union *wins* the vote. This is rather an astonishing submission. It is apparent that section 63(6)(a) would operate to cause the Board to do just that if the union were to *lose* the vote. The respondent would then be free to operate the entire Nursing Home, rather than just a part, on the basis of its own policies and employment terms and conditions (although obviously the provisions of the *Labour Relations Act* continue in such situations to act as a safeguard against any form of discrimination against formerly unionized employees). But if the union *wins* the vote, it surely should not be in a worse position, vis-a-vis the collective agreement, than it had been at the new facility *prior* to the vote. The Board therefore wishes to make it clear that, an opportunity having been granted for a representation vote to cure the anomaly of the respondent's two "intermingled" businesses being operated one under the terms and conditions of a collective

agreement and one not, the result of a vote in favour of the union will mean that the terms and conditions of the Willson collective agreement will apply to the *entire* Nursing Home until, in accordance with the *Hospital Labour Disputes Arbitration Act*, a new collective agreement has been entered into between the parties.

17. The question of damages for the failure to date of the respondent to honour the seniority rights of former Willson Nursing Home employees does not form part of what is now a section 63 application. As pointed out orally to the respondent, however, that liability flows naturally from the Board's finding of a "sale", and the ultimate cost to the respondent continues to mount with each day that former Willson employees who should have been offered employment, remain on the street. For this reason, together with the Board's own interest in finalizing this matter by being able to conduct without further delay the representation vote directed in its August 24th decision, the Board hereby appoints its Officer, L. Stickland, to meet with the parties immediately upon receipt of this decision, in order to assist the parties to carry out all of the preliminary steps necessary to placing the Board in a position of holding its representation vote.

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**2053-83-U** Service Employees International Union, Local 183,  
Complainant, v. **Daynes Health Care Limited**, Earl Daynes, Respondents, v.  
Group of Employees, Interveners

**Damages — Sale of a Business — Unfair Labour Practice — Board finding sale — Successor obliged to staff new facility with predecessor's employees — Failure resulting in liability in damages for wages and benefits as per collective agreement — Whether "intermingling" with other employees already hired**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

**APPEARANCES:** Naomi Duguid, Don Burshaw II and Carolyn Shaughnessy for the complainant; Michael Gordon for the respondent; M. Longworth for the interveners.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN AND BOARD MEMBER B. L. ARMSTRONG;** March 5, 1985

1. This is the continuation of an unfair labour practice complaint stemming from an earlier finding of the Board (in Board File No. 0927-83-R, reported [1983] OLRB Rep. Sept. 1564) that the transfer of, *inter alia*, a 51-bed Nursing Home licence from Balmoral Lodge Nursing Home Ltd. to Daynes Health Care Limited, operating at a new facility in Peterborough under the name Riverview Manor, constituted a "sale of a business" for the purposes of section 63 of the *Labour Relations Act*. Since that decision of the Board, the respondents have declined to employ at the new facility any of the employees from Balmoral Lodge beyond those few whom they were already employing, and further declined to recognize their liability to pay damages to any of the former employees of Balmoral Lodge out of work as a result. The complainant trade union has alleged throughout these proceedings:

1. that the obligation of the respondents to offer employment at Riverview Manor to all Balmoral employees, and to pay damages for any delay in doing so, flowed as a matter of law from the "sale" (particularly as set out in the Board's decision in *Emrick Plastics*, [1982] OLRB Rep. June 861); and
2. that the respondents' failure to employ these Balmoral employees was in any event the product of anti-union *animus*, and therefore in violation of the *Labour Relations Act*.

2. The parties' proceedings before the Board in fact began prior to the "sale" application which was decided in September 1983. The complainant and the respondent Daynes Health Care Limited applied to the Board in March of 1983, prior to the transaction being contemplated having actually taken place, for an advisory opinion as to whether what the parties had in mind would constitute a "sale of a business", with all of the legal obligations attendant upon that, within the meaning of our Act. As the Board observed in its decision therein, reported [1983] OLRB Rep. May 632:

12. . . . From the union's perspective, it has a number of members who face the prospect of termination in June and who are anxious to know *whether their collective agreement rights and hence claim to jobs at Riverview will be preserved*. The employer is anxious to ascertain *the parameters within which he can establish the employee complement and the terms and conditions of employment* of the persons hired to work at Riverview. There is no indication that the employer would abort or alter the form of the transaction depending upon the Board's decision, *but it is obviously and understandably, interested in avoiding any potential liability associated with the legal uncertainty*.

[emphasis added]

The Board went on to express its sympathy for the parties' desire for an "advance ruling", particularly in light of the purchaser's intention to staff the new facility from sources other than Balmoral employees, but pointed out the difficulty it would have in rendering a decision prior to the time that the facts of the transaction had fully crystallized. The Board accordingly concluded its decision by saying:

14. For the foregoing reasons, we have determined that this application must be dismissed as premature. Such dismissal, of course, is without prejudice to either party bringing a fresh application at an appropriate time in the future.

3. What happened after that is set out in the initial decision of the Board in the present complaint, now reported at [1984] OLRB Rep. August 1091:

15. Between the dismissal of the first section 63 application on May 31, 1983, and the hearing of the second one on October [should read "August"] 25, 1983, Daynes elected to proceed as if it had no special responsibility to consider the claims of Balmoral employees or their trade union. In June, 1983, Daynes advertised for, and received, applications for positions at Riverview Manor. To protect themselves, most of the Balmoral employees applied for those positions — even though the union continued to maintain that they should not have to "apply" for "their own jobs". By July 16th, Daynes had selected those individuals whom it wished to employ. These included a few employees already working for Balmoral, a few individuals already employed in other Daynes' facilities, and a much larger group of persons hired "off the street". Daynes was aware, of course, that there would shortly be a second successor rights application. Daynes was also aware of the union's claim that Daynes was acquiring and carrying on Balmoral's nursing home business, and that Balmoral's employees had a preferred right to the work opportunities generated by



that business. Daynes was taking a risk that its legal position would not be sustained before the Board. Daynes was prepared to take that risk.

The second section 63 application was brought without delay, following completion of the sale transaction in August, and the Board, equally without delay, rendered its decision, against the employer, on September 15, 1983. The reaction of the parties to *that* decision is also chronicled in the August 1984 decision:

19. The Board decision of September 15th did not alter the respondent's stance. The respondent did not accept the section 63 declaration. The respondent did not acknowledge the collective agreement or apply its terms to the employees working at Riverview. The respondent did not recall or reinstate any former Balmoral employees. When those employees filed grievances under their collective agreement, asserting that their seniority (etc.) entitled them to continued employment, the grievances were ignored. The respondent did not process them. The respondent sought judicial review of the Board decision. The union filed this complaint.

4. In this complaint the employer took the narrow position that *Emrick Plastics*, *supra*, did not apply, or ought not to apply, to the facts before the Board in this case. The *Emrick Plastics* case dealt at some length with the question of a successor employer's obligations to the *employees* of his predecessor upon a "sale of a business", and concluded:

18. We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement than the vendor would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a give point in time as a termination or a lay-off.

As the panel put the issue before it in the present proceedings, again in the August 1984 decision:

28. As we have already mentioned, the position taken by Daynes in this case is very similar to the one taken by the respondent employer in *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861 — so similar, in fact, that counsel for Daynes conceded that Daynes' position could not be sustained unless Emrick were distinguishable or this panel of the Board was persuaded to reject the *Emrick* reasoning.

And, as the Board noted:

30. . . . If such obligation (to continue the employment of Balmoral employees) flowed naturally from section 63, the employees of Balmoral would have to be retained, and it is unnecessary to consider whether Daynes' refusal to retain them constitutes an independent unfair labour practice.

5. The respondents' argument that *Emrick Plastics* did not apply in this case turned on the fact that Riverview opened its doors, and began accepting residents from Balmoral, a few days before Balmoral was completely and finally closed. A brief recitation of the facts from the "sale" decision of September 15, 1983, will help to place the respondents' argument in context:

5. Balmoral and Mr. Daynes entered into an arrangement whereby Daynes would purchase both Balmoral's licence and the property at 1155 Water Street. Daynes intended to apply the licence to a new home to be constructed on Water Street. An agreement between

Balmoral and Earl Daynes was executed on April 16, 1982. Daynes agreed to "purchase the licenced nursing home business undertaking" of the vendor. The agreement defined "licenced nursing home business" to mean "the 51 bed nursing home presently located ... at 293 London Street, Peterborough". "Undertaking" was defined as "the right to operate the 51 bed licenced nursing home business, granted in the form of a licence issued under the authority of the Ministry of Health". The contract was conditional on the Ministry of Health approving the transfer. ...

6. . . . In the fall of 1982, the Ministry authorized the transfer of the licence from Balmoral to Daynes. The construction of Riverview Manor began in October 1982, and it was completed on August 10, 1983. On the next day a team of inspectors from the Ministry of Health visited Riverview Manor and gave final approval for it to open as a home licensed for fifty-one residents.

7. While construction was in progress the Ministry insisted that the top floor of Balmoral be closed. The eighteen residents who had lived there were transferred to Extendicare's home in Peterborough in February, 1983. Balmoral's legal capacity was temporarily reduced from fifty-one to thirty-three, and Extendicare's licensed capacity was increased correspondingly on a temporary basis, to drop back to its original level through attrition.

8. The remaining thirty-three residents of Balmoral Lodge were transferred to Riverview Manor between August 15 and 18, 1983. During this brief period the two homes operated concurrently with the approval of the Ministry of Health, and when the last residents were moved Balmoral surrendered its licence. . . .

The Board dealt with the thrust of the respondents' argument in its conclusions set out at paragraph 38 of the August 1984 decision:

When the sale of a business occurred, the Balmoral employees did not revert to the status of "laid off employees" or employees who had been properly terminated. They were actively employed by Balmoral until its business had been completely transferred to Daynes, and, upon the acquisition of Balmoral's business, they became employees of Daynes with full seniority rights and a claim to any work opportunities then available. Their status as employees in the bargaining unit did not change, and Daynes had no more right to change it than its predecessor had. *Nor does it matter that*, in reality, the actual acquisition of Balmoral's business took place in stages over a three-day period, as Balmoral gradually withdrew from the business of providing nursing home care to its residents, and Daynes gradually assumed that responsibility. *Notionally, this means only that Daynes gradually acquired parts of Balmoral's business and by August 18, 1983, it had finally acquired the whole.* That could not affect the rights of Balmoral employees who, as the transfer of business unfolded, became employees of Daynes. The Balmoral employees could not be discharged without just cause, and if Daynes suddenly found itself with too many employees for the available work, it was required to reduce its work force in accordance with the layoff provisions in the collective agreement, taking into account the seniority rights of all of its employees.

[emphasis added]

6. That panel of the Board, as can be seen, dealt with the case at that stage on the assumption that the respondents had lawfully employed persons at Riverview other than those working at Balmoral Lodge for at least the three or four days before Balmoral closed. The Board proceeded on that assumption because that issue had not yet been litigated: such "lawfulness" would require, in light of the collective agreement found by the "sale" decision to continue to apply, as well as the unfair labour practice provisions of the *Labour Relations Act*:

- 1) that the respondent did in fact have a need, while beds were gradually being "moved" from Balmoral to Riverview, for more employees to

operate both locations than already were employed at Balmoral Lodge (presumably on the basis that sufficient staff could not be moved from Balmoral as the beds moved);

- 2) that there were no employees on lay-off with recall rights under the Balmoral agreement at the time; and
- 3) that the decision to hire persons other than Balmoral employees for the start-up of Riverview was in any event not tainted by any anti-union considerations.

As it turns out, however, the issue of whether the non-Balmoral employees were hired lawfully is irrelevant. The best it could do for the respondents, as the Board noted in the paragraph just cited, would be to open up a competition for retention of the available jobs at Riverview on the basis of whatever seniority rights the non-Balmoral employees (again, assuming they had been lawfully hired) could claim to have acquired under the collective agreement in the few days before Balmoral Lodge finally closed and additional employees had to be laid off. But as the material disclosed to the Board at the last hearing indicates, those employees acquired *no* such seniority rights, for the reasons discussed below.

7. Arbitrators are frequently called upon to decide whether an individual, once properly transferred into a bargaining unit from service with the employer elsewhere, can claim seniority credit for *all* service with the employer, or only for service spent *within the unit*. In this case, the language of the particular collective agreement, to begin with, points heavily against the seniority claims of non-Balmoral employees, in that it provides:

#### ARTICLE XIII: SENIORITY

13.01 An employee will be on probation until he has completed three (3) calendar months of *employment*. Upon completion of such probationary period, the employee's name shall be placed on the respective seniority list and credited with three (3) calendar months seniority. . . .

[emphasis added]

The use of the word "employment" in that Article could, of course, point in either direction. But this particular agreement defines the meaning of "employee", and thus arguably the meaning of "employment", as follows:

2.03 The word "employee" or "employees" wherever used in this Agreement shall be interpreted as such, limited to the scope of this Agreement.

And that scope is defined as follows:

#### PREAMBLE

WHEREAS the Union has been certified by the Ontario Labour Relations Board as the certified bargaining agent of the employees of the Employer in the bargaining unit described as follows, namely: all employees of Balmoral Lodge Limited in Peterborough, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.



## ARTICLE II: SCOPE AND RECOGNITION

2.01 The Employer recognizes the Union as the sole collective bargaining agent for all its employees at the Balmoral Lodge Limited as certified by the Labour Relations Board on February 29, 1980, and as specified in the preamble of this Agreement.

8. All of this points in the direction of finding that "seniority" under this agreement is based on employment in the transferred Balmoral Lodge unit, rather than with the successor employer generally. Making this analysis redundant, however, is the fact that the respondents have now acknowledged that the "employer" at Riverview Manor is different from that at any other Nursing Home in which Mr. Daynes has an interest, including the Homes from which some of the non-Balmoral employees were drawn. Mr. Daynes, we are told, has different partners in the corporations operating each of these Homes, and the "employer" entity in each case is different. Accordingly, it ceases to matter whether the language of Article 13.01 is to be read as granting seniority rights after three months' employment in the bargaining unit itself, or with the employer generally: in either case, on the facts before us, "employment" for the non-Balmoral employees with the employer in question dates back only to the hiring at Riverview Manor Nursing Home. That employment did not for *any* non-Balmoral employee reach three months by August 18, 1983, the date when Balmoral Lodge closed and the seniority rights of its employees to continue in active employment, as opposed to being laid off, had to be assessed. Even assuming all of the earlier points in the respondents' favour, therefore, it turns out that the question of seniority rights left open by the Board's August 1984 decision cannot assist the respondents, nor the individuals that they retained in favour of the Balmoral Lodge employees, in any competition for the available jobs at Riverview as of August 18, 1983.

9. There remains to consider one further argument, put forward chiefly by Mr. Longworth on behalf of 5 employees of other "Daynes" Homes hired at Riverview in preference to the Balmoral employees. This is an argument which Mr. Longworth requested leave of the earlier panel to reserve on, and accordingly was not specifically addressed by that panel in its decision of August 1984. The argument is that the hiring at Riverview of non-Balmoral employees prior to the closing of Balmoral itself created a situation of "intermingling" of Union and non-Union employees within the meaning of sub-section (6) of section 63 of the Act, such as would justify the taking of a representation vote. Mr. Longworth argues that, one way or another, the hiring of both Balmoral and non-Balmoral employees at Riverview is a *fact*, and one that the Board ought now to be prepared to take into account.

10. In the Board's view, however, what occurred in this case (again, assuming that the hiring of non-Balmoral employees at least for the transitional week was lawful) was not the kind of "intermingling" giving rise to the extraordinary remedies provided, in spite of a "sale of business", in section 63(6). Subsection (6) provides:

(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;

- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

And subsection 8 provides:

- (8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

Dealing with the meaning of “intermingling”, as used in subsection (6), the Board in *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, considered an earlier decision of the Board in *Bermay Corporation Limited*, [1979] OLRB Rep. July 608, and commented:

27. . . . We do not understand the quoted references to “new employees” as suggesting that the Board will order a representation vote whenever a successor employer hires, at or shortly after the time of a sale, persons who were not previously employed by the predecessor employer. The “new employees” referred to by the Board in *Bermay Corporation Limited* were employees hired simultaneously with the consolidation by Bermay of its existing furniture business with the business it purchased from Goldcrest and the consequent intermingling of Bermay’s former employees with employees formerly employer by Goldcrest. The Board’s resort in *Bermay Corporation Limited* to its powers under section 63(6) did not depend on the presence or absence of “new employees”, but on the intermingling of employees identified with the two pre-existing bargaining units. It may not have been possible, and in any event was not necessary, for the Board to determine whether the “new employees” represented an accretion to one or other or both of those pre-existing bargaining units. The important fact was that the merger of *businesses* had made it necessary to redefine bargaining units and, as a result, bargaining rights; it was that exercise, and not the hiring of “new employees”, which created the representation issue to which the Board responded by ordering a representation vote.

28. In this case, the respondent Antonacci Clothes came into existence for the purpose of engaging in the transaction which we have found constituted a sale of business within the meaning of section 63. The only business in which this respondent has engaged is the business it purchased from British Brand. All its employees can therefore be described as falling within the “like” bargaining unit in respect of which the applicant’s bargaining rights are preserved by our finding that there has been a sale of business. If one disregards the change in ownership of the business in question, the situation here is this: a small number of the employees employed in the business prior to February 1st are no longer employed in it, and another, larger, number have since been hired to work in the business. Those circumstances would not normally give rise to a question of representation, unless it were a question raised in a timely manner by the employees themselves. The fact that some employees are new to the unit is of no more consequence than it would have been had the ownership of this business remained unchanged. The change of ownership does not change that result where, as here, the sale of business has not itself created circumstances which give rise to a question of representation.

[emphasis added]

11. The same can be said of the present situation, even if (contrary to what we now know) the successor employer of Balmoral was the same entity that owned and operated other Nursing Homes in the province. It is a special characteristic of nursing homes in this province that they may only be operated under the authority of a licence that is specific as to both number of beds and the geographic area, and the only source of authority under which Riverview Manor was permitted to open and operate in Peterborough was the sale, or pending sale, of the 51-bed

Balmoral Lodge licence. In *Caressant Care of Canada Limited*, [1984] OLRB Rep. August 1060, by way of contrast, the purchaser of a Nursing Home licence in St. Thomas combined that licence (and the corresponding beds) with a licence it had just acquired on its own from the Ministry of Health. To the extent, in other words, that these geographically-limited licences have become synonymous with a “business” in this industry, the successor had in fact provided at the new St. Thomas location additional work opportunities from a second “business” of its own, and not simply additional staff. The Board found *that* situation to constitute “intermingling”, as contemplated by section 63(6), and in doing so drew the following contrast:

... Indeed, where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing ‘business’, it is difficult to see how the provisions of section 63(6) can be meant to apply at all, irrespective of where the employees may be drawn from. A purchasing employer does not, in other words, create a situation where the bargaining rights attaching to a single, newly-acquired business are called into question simply by supplementing the bargaining unit with employees not previously covered by the collective agreement, whether those employees are selected from “off the street”, or from an entirely different location of the employer. A purchaser dealing with a single business is in the same shoes as the vendor vis-a-vis the collective agreement. It is true that the subsection speaks of the purchaser intermingling the *employees* of one business with those of another. But that appears to be simply a more precise way of referring to the intermingling of the businesses themselves: it is in fact the “employees” of the businesses who are capable of being “intermingled”. The focus of section 63 is on the business and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one “non-union”, which would appear to have prompted the Legislature to provide the relief contemplated by subsection 6. . . .

12. Here all of the work opportunities at the new facility of Riverview Manor as of the date Balmoral Lodge closed were those provided by the 51-bed licence which Balmoral Lodge Nursing Home Ltd. had agreed to sell to Daynes Health Care Limited, and in contemplation of which the Ministry approved the early opening of Riverview. The fact that another Home in the area, Extendicare, was allowed to increase its licenced allotment temporarily because one floor of Balmoral had to be closed before Riverview was ready does not, as Mr. Longworth would argue, change anything. Extendicare’s licence was gradually allowed to reduce through attrition to its original level, and Riverview by the date of Balmoral’s closing was allowed to operate the same 51-bed complement it had been promised under the arrangement with Balmoral. While a “business” in this industry does in fact appear to be synonymous with a licence to operate, and its corresponding beds, it is not synonymous with the actual *residents* occupying those beds at a given point in time. The authority of Daynes Health Care Limited to operate a 51-bed Nursing Home in the City of Peterborough, as of August 18, 1983, came from the licence it had agreed to “purchase” from Balmoral, and nowhere else. Once this is recognized, it becomes apparent that the recently-reported decision of the British Columbia Labour Relations Board in *Bell Farms Limited*, [1985] CLLC ¶ 16,007, referred to the Board by Mr. Longworth subsequent to the hearing, is analogous to the case of *Caressant Care of Canada Limited*, and not to the present case at all.

13. From all of the foregoing, to sum up again, it follows that Daynes Health Care Limited was under an obligation to staff the new facility at Riverview, operating under the licence “transferred” from Balmoral, with the available staff from Balmoral Lodge. And if that was Daynes’ legal obligation, it also follows that it is liable in damages to those employees to the extent that it failed to do so, on the basis of all wages and benefits properly payable under the terms of the Balmoral collective agreement. Whether, as the union suggests, it is also liable to pay damages to the *non*-Balmoral individuals actually employed but not paid in accordance



with the collective agreement, as the union argues, is more problematical. Those individuals have only been employed at all over the past 17 months on the basis of the respondents' position that no collective agreement governed the situation, and we are not persuaded that it is open to persons in this group to claim that they have suffered monetary loss under the collective agreement because the respondent's position was wrong.

14. As for Daynes Health Care Limited itself, having been aware, when it sought an advance ruling, of the risks it was incurring in proceeding to hire without regard to the Balmoral collective agreement, having continued to ignore the collective agreement after the Board's finding of a "sale of a business" in September of 1983 (and we recognize that Daynes applied for judicial review of that decision, as was its right), and having failed to modify its position and take steps to protect itself even after the further Board decision adverse to it in August of 1984, it now asks the Board to take into its remedial consideration the fact that a damage award of 17 months' duration to all of those Balmoral employees whom it did not hire would have the practical effect of forcing the company into bankruptcy, to the detriment of all parties concerned.

15. While the Board, in the present circumstances, might be excused for reacting immoderately to that submission, it is sufficient to point out that over that same period of time the Balmoral employees left on the street have each, as individuals, suffered the precise loss that the respondents are now concerned about being called upon to pay. So far as the powers of the Board are concerned, we clearly must order those losses to be borne by the party or parties whom the Board has found to have acted unlawfully. Whether, as a practical matter, the extraction of the full measure of damages is in all of the parties' continued best interest is a matter that the complainant, as it has indicated, is capable of assessing on its own, and dealing with in discussions with the respondents. And in the event the parties are unable to work out an arrangement that permits the continuation of the employment opportunities over which these (lengthy) proceedings have been fought, the complainant is entitled to its order from the Board to substantiate its position in any bankruptcy proceedings. The question of creditor priorities, beyond that, is not a matter for the Labour Relations Board. The concerns expressed by the respondent Daynes Health Care Limited do, however, underscore the very concerns of the complainant which previously led to the addition of Earl Daynes personally as a respondent, and it is not inconceivable in light of all of the circumstances and allegations surrounding these proceedings, that the Board could ultimately be persuaded that this is an appropriate case to direct its compensatory order against Mr. Daynes as well. Compare, for example, *Sunnylea Products & Jacob Zunnfeldt*, [1981] OLRB Rep. Nov. 1640.

16. Apart from all of the foregoing, the parties have advised the Board that, following their own discussions with respect to the final resolution of this matter, the respondent Daynes Health Care Limited is now ready to offer employment to a list of former Balmoral employees worked out by the parties. That ought to take place immediately, as continued delay for any reason only adds to the ultimate total in damages which the respondent will be liable to pay. Unfortunately, however, the parties at the hearing were in dispute over the impact of the public sector's *Inflation Restraint Act* on the Balmoral Lodge collective agreement which the respondent has inherited, the second year of which appears to fall within the "control" period for that legislation. That collective agreement was not submitted to the Inflation Restraint Board for approval, and the respondent indicates that that Board continues to be available for such a procedure. It is agreed that, in the present circumstances, the discretionary range for increases permitted under the legislation (assuming no other adjustments to the "compensation" package) for the second year of this collective agreement (i.e., effective July 1, 1983) is between

38 and 50 cents per hour (or \$750.00 to \$1,000 over the control year). The respondent's position with respect to the Inflation Restraint Board is set out in a letter to the Board dated January 28, 1985, the essential points of which are as follows:

Accordingly then, and to recapitulate, my client is unable to agree to the wage rates put before the Board by Ms. Duguid as applying to the second year of the Collective Agreement as being accurate and correct. The Company takes the position that the rates payable under the provisions of the Collective Agreement commencing July 1, 1983 are properly governed by the provisions of the Inflation Restraint Regulations.

My client takes the position that the entire Agreement must be put before the Inflation Restraint Board and that the increases under that Agreement, including all fringe benefits and fringe benefit costs, cannot be implemented without IRB approval. My client takes the position that the increases themselves must be limited to \$750 (maximum) [i.e. 38 cents per hour] in view of the financial position of the enterprise and the very substantial increase in rates which occurred in the first year of the Agreement.

The response of counsel for the complainant was that the predecessor Balmoral had already, prior to the sale, unilaterally implemented the full 50 cent an hour increase in the second year of the collective agreement, and that that was accordingly the rate that the purchaser of the business had "acquired". In response to this, counsel for the respondents in a further letter of February 21, 1985, made the following acknowledgment:

My client has no means by which to challenge the assertions made in the second paragraph of counsel's letter and, accordingly, is not in the position to argue that the increase of \$.50 per hour was inappropriate, even though there was a total failure on the part of the Predecessor Employer and the Trade Union to disclose those matters to the purchaser prior to the closing of the said transaction.

Counsel also in that letter, however, states:

I am instructed by my client that it is its view that the Collective Agreement in question between the Predecessor Employer and the Union is subject to IRB Guidelines. Accordingly, the increment in the *first* year of the Agreement ought to have been a total of nine per cent (9%) . . .

[emphasis added]

On the basis of what facts the *Inflation Restraint Act* can be said to apply to the first year of the collective agreement, which counsel's January 28, 1985, letter appears to acknowledge, came into force prior to the date that the legislation did, is not explained, and the Board is not prepared to give any weight to this apparent change of position by the respondents.

17. That the restraint legislation limits increases in "compensation" in the second year of the agreement to the 50 cents an hour already implemented by Balmoral, on the other hand, is acknowledged by the response of the complaint itself, which submitted through its counsel's letter of February 14, 1985:

Consequently, at the time the sale took place, employees were receiving wages which had been increased in accordance with the provisions of the Act by \$.50 per hour. This is the wage rate "acquired" by the successor employer, Riverview, which must continue to pay such rate to employees pursuant to the provisions of the agreement until the expiry of the control year on June 30, 1984.

The parties are proceeding to conciliation, and have not yet reached a new collective agreement. Thus, the wages payable to employees at present and pending either a negoti-

ated settlement or the decision of an interest arbitrator, should be the wage rates set out in the collective agreement for the period up to June 30, 1983 plus \$.50 (per hour).

Having said that, then, the complainant went on to submit:

There is no need for the parties to submit such increases to the Inflation Restraint Board, since they fall squarely within the increases allowed by the Act in the control year. . . .

We would therefore ask that the Board make the appropriate order as to compensation payable to employees, originally terminated by Balmoral in August, 1983, and to pay them compensation calculated in accordance with the wages described in this letter . . .

18. Having regard to the foregoing, the Board is of the view that it ought to direct the respondent to offer to re-instate the Balmoral employees forthwith (subject only to the medical examinations required by law) on the basis of paying them at a rate of 50 cents per hour above the hourly rate in force under the collective agreement as of June 30, 1983. As the respondents have indicated they are no longer in a position to put forward the submission that the 50-cent increase already put into effect by the predecessor is inappropriate, and as the complainant appears to be content to recognize that the restraint legislation would allow no other "compensation" to be claimed under the second year of the contract, we agree with the complainant's submission that no further issue appears to exist before this Board which could be affected by a determination of the Inflation Restraint Board.

19. It is therefore the order of the Board that the respondent Daynes Health Care Limited:

- (1) forthwith offer to re-instate in active employment the former employees of Balmoral Lodge in accordance with the wage rate set out in paragraph (2) and with the seniority list filed by the parties with the Board, without loss of either seniority or service credit from the time of their lay-off; and
- (2) forthwith compensate such employees in damages for all loss of wages and benefits as a result of their wrongful lay-off, including interest in accordance with Board Practice Note No. 13, on the basis of a wage rate of 50 cents per hour above the rates in effect under the collective agreement on June 30, 1983.

The complainant has asked as well for a posting and meetings on the premises. It should be borne in mind, however, that it has not been found necessary to litigate this complaint on the basis of anti-union *animus*. In the view of the Board, the history of these proceedings set forth in the body of this decision can be hoped to be self-explanatory to the employees affected, and, since any further explanation by the union presumably will precede the former Balmoral employees' acceptance of the respondent's recall offer, the additional requests for relief by the complainant are denied.

20. The Board will remain seized of this matter should the parties find themselves unable to agree on the assessment of damages owing under paragraph 19(2) above.

#### **OPINION OF BOARD MEMBER W. H. WIGHTMAN;**

Having dissented from the majority in the earlier finding (Board File No. 0927-83-R) I cannot concur in this finding which I believe flows from an incorrect premise.



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**2486-84-U; 2487-84-U; 2488-84-U** Famz Foods Limited, Complainant, v. United Food and Commercial Workers Union, Respondent; Bini Foods Limited, Complainant, v. United Food and Commercial Workers International Union, Respondent; **Dinnerex Incorporated**, Complainant, v. United Food and Commercial Workers International Union, Respondent

**Evidence — Practice and Procedure — Witness — Whether documents listed in subpoena irrelevant — Whether production appropriate where resulting in disclosure of bargaining strategy — *Shaw-Almex* decision not requiring production of documents for examination by other party before propriety and scope of subpoena challenged**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *Stephen J. McCormack for the complainants Famz Foods Limited and Dinnerex Incorporated; Brian O'Byrne for the complainant Bini Foods Limited; Martin Levinson and Kevin Park for the respondent.*

**DECISION OF THE BOARD;** March 25, 1985

1. These complaints were filed under section 89 of the *Labour Relations Act* alleging violation of section 15 of the Act. The parties agreed that the three complaints would be heard together but not formally consolidated. Simply put, each of the respondents operates a Swiss Chalet franchise and is currently bargaining with the respondent for a first collective agreement.
2. Pursuant to a direction of the Board, the parties met and were able to agree on a partial statement of facts. Apart from this agreement (including agreement orally on a few matters) and several documents placed before the Board, the complainants chose to call no further evidence.
3. Counsel for the respondent commenced its case by calling one Kevin Park, a staff representative of the respondent and involved in the negotiations between each of the complainants and the respondent union. Examination in chief was completed on the first day of hearing; cross-examination was not commenced. A continuation date was set for February 26, 1985.
4. Before that date, however, the complainants served Park with a subpoena *duces tecum*. The covering letter on the subpoena from counsel for the complainant Famz Foods is dated February 20, 1985. There is no dispute that the subpoena was properly served although the Board was not informed as to the precise date of service; presumably service was on or after February 20th. There is also no dispute that Park would have control over and be able to produce the documentation mentioned in section 3(i) of the subpoena as may exist.
5. At the hearing on February 26th, counsel for the respondent challenged the propriety and scope of the subpoena on several bases. The Board heard the submissions of all parties on the issue of the proper scope of the subpoena. The Board adjourned proceedings and agreed to issue an interim decision in this matter prior to the next continuation date. The Board notes

that, with respect to several cases cited by counsel for the respondent in reply, counsel for the complainants were given the opportunity to make written submissions to the Board by March 8th.

6. The foregoing is intended to briefly outline the background leading to this interim ruling. The submissions of the parties and the Board's determination of the issue are set out in more detail below.

7. It is appropriate at this point to set out Schedule A attached to the subpoena served on Park:

1. Return of posting by registered mail card and copy of registered letter dated December 13, 1984 addressed to Allen A. Morrow from Kevin Park:
2. Courier slip acknowledging receipt of and copy of letter dated January 8, 1985 addressed to Kevin Park from Allen A. Morrow;
3. Copies and/or originals of any and all records, writings, memoranda, correspondence, minutes, leaflets, literature updates flyers and pamphlets (hereinafter collectively and individually referred to as the documentation) in the possession, custody, power and/or control of the union as hereinafter defined and/or yourself touching and concerning and/or dealing with proposed and/or actual collective bargaining negotiations between and/or among the United Food and Commercial Workers, International Union and/or any of its locals, districts, regional councils or subordinate bodies and affiliates (hereinafter collectively and individually referred to as the "Union") and owners, operators and/or franchisees who carry on business under the name and style of Swiss Chalet Bar-B-Q restaurant in the Province of Ontario (hereinafter collectively and individually referred to as the "Employers"), and in particular, without limiting the generality of the foregoing:
  - (i) documentation touching, concerning pertaining to and/or dealing with the unions strategies, designs, programs, positions, timing and/or goals with respect to the structure, scope, content and conduct of the above-mentioned collective bargaining negotiations including documentation relating to joint bargaining, common bargaining, multi-employer bargaining, province-wide bargaining and/or simultaneous or concurrent bargaining between the union and the Employers; and
  - (ii) any and all documentation relating to the complaint herein.

8. With respect to items 1 and 2, counsel for the respondent asserted such material was not available; counsel for the complainants did not press this further.

9. In view of the positions taken by the parties, it is also necessary to summarize Park's examination-in-chief. This summary does not involve any findings of fact or assessment of credibility by the Board.

10. Park's testimony-in-chief may be summarized as follows:

- (a) Park has been on staff of the UFCW since 1981 and has been involved in the Swiss Chalet negotiations;
- (b) Park testified that exhibit 4 had not been received when exhibit 5 was drafted; (exhibit 4: a letter from one Allen Morrow, Director of Human Resources/Industrial Relations dated January 8, 1985 which, *inter alia*, stated that negotiations would be at individual Swiss Chalet locations.)
- (c) exhibit 5: Park's letter to Morrow dated January 9, 1985 states, in part:

I would renew my suggestion that in light of the similarities of the bargaining units, employers, collective bargaining agent and employer representatives that a single mutually [sic] site and time be adopted for the bargaining in all of these locations to commence.

- (d) Park said he did not take the position that bargaining would not commence unless the companies agreed to joint bargaining and, indeed, negotiating meetings were held at the separate locations;
- (e) at the bargaining meetings, Park outlined the union proposals (exhibit 6) and the reasons for the various demands, including the seniority/inter-store transfer clauses;
- (f) during the negotiating meetings, Park testified he did not indicate that the union would not negotiate further unless or until the seniority/inter-store transfer proposals were accepted;
- (g) future dates for negotiations at each location were set, tentatively set or being discussed by Park and Sharon (the chief negotiator for all these complainants);
- (h) with respect to the reference in item 7 of the agreed statement of facts, Park stated he did not learn of Morrow's vacation plans until January 21st when so informed by Sharon, i.e. Park was not aware of the conflict between Morrow's vacation and the dates proposed for negotiations in Park's letter of January 9th when that letter was drafted;
- (i) further, at the time the January 7th letter was drafted, Park stated he did not know that Morrow would be directly involved in the negotiations;
- (j) Park testified that he met with Sharon in all of the negotiating meetings, although there were others present for the complainants as well; Morrow was present at the Ottawa store negotiations but Park indicated that Morrow did not play a leading part in presenting the company's position.



11. Counsel for the respondent submitted that the wording in item 3(i) of the subpoena *duces tecum* covered a broad range of matters relating to the union's negotiating strategy which were not material to the allegations in the complaints. Moreover, it was argued that since the union had not set joint bargaining and/or the seniority/inter — store transfer proposals as a precondition, nor were the parties at impasse, the request for documentation with respect to both issues was irrelevant. Counsel referred to *Shaw-Almex Industries Limited* [1984] OLRB Rep. Apr. 659 and the cases cited therein particularly, *The Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732; *Re Bell Canada* (1980) 25 L.A.C. (2d) 200; *Agilis Corporation Limited*, [1971] OLRB Rep. Feb. 98; *Gordon-Nelson Development Company Limited*, [1984] OLRB Rep. June 807; *Master Insulation Company Limited*, [1981] OLRB Rep. Jan. 94. Counsel characterized the subpoena as a "fishing expedition". Counsel also opposed the subpoena on policy grounds. It was argued that collective bargaining was the cornerstone of the *Labour Relations Act*; the Board should not enforce disclosure of documents which would be highly prejudicial to the union in conducting its negotiations and, thereby, undermine the collective bargaining process. The dangers of such disclosure were particularly acute where, as here, it was submitted, the bargaining proposals often identified union members at various Swiss Chalet locations and the complaint was frivolous and harassing or, at least, premature. The Board notes that counsel referred to several cases, including *Bois Lachance Lumber Limited*, [1984] OLRB Rep. Jan. 1, dealing with termination applications. The Board does not consider these cases relevant to the subpoena issue and, hence, does not refer to these further.

12. For convenience, the arguments of both counsel for the complainants are set out together as each adopted the comments of the other. The Board also notes at this point that all counsel slid into arguments directed toward the merits of the allegations. As this decision deals only with the subpoena *duces tecum*, the Board has not set out the various arguments on the merits except as necessary to the submissions on the subpoena issue. The Board makes no factual or legal findings in this decision other than those strictly necessary to deal with the respondent's objections to the subpoena. Specifically, the Board is not addressing the merits of the alleged violations.

13. Counsel for the complainants contended that the subpoena was not intended to obtain the union's strategy with respect to the various issues in dispute at the bargaining table. The complaint alleged that the union had a premeditated course of conduct directed to delaying the conclusion of collective agreements, to going through the motions of bargaining to ensure the union would be in a position to strike all stores at the same time. Counsel argued the union had dragged its heels and was not interested in real bargaining until the timing was right, in the union's view. The subpoena was intended to obtain any documents relating to the union's strategy with respect to "simultaneous" bargaining at the various locations. Counsel submitted the respondent had, in examination-in-chief, opened the issue of bargaining at all Swiss Chalet locations. Counsel also submitted the *Shaw-Almex* decision, *supra*, required the party served with the subpoena to first deposit the documents so as to permit examination by the other party *before* the relevance of various documents could be argued. Further, counsel asserted the implied undertaking against improper use of the information contained in the documents, also as set out in *Shaw-Almex*, was sufficient protection. Finally, counsel argued that section 15 would have been violated, and therefore the documents relevant, if the union had decided to insist on simultaneous bargaining whether or not the union had backed off from that position before impasse. In counsel's view, the subsequent individual negotiations would not have cured the violation, although the remedy would be moot except to prevent repetition of such conduct.

14. As counsel for the complainants expressed a willingness to re-draft the subpoena to restrict its scope to what was intended, at this point the Board directed the parties to meet to ascertain whether, in view of the comments thus far, there could be agreement as to the proper scope of the subpoena. The parties were unable to so agree. However, counsel for the complainants proposed an amendment to item 3(i) so that section would read:

3(i)documentation touching, concerning pertaining to and/or dealing with the unions strategies, designs, programs, positions, timing and/or goals with respect to the structure, scope, content and conduct of the above-mentioned collective bargaining negotiations including documentation relating to joint bargaining, common bargaining and/or simultaneous or concurrent bargaining between the union and the Employers; and but for greater certainty, no documentation need be produced concerning the future position of the union with respect to any particular issue in dispute in bargaining, such as, wages, health and welfare benefits, etc.

15. Counsel for the complainants made the following comments by way of clarification of the above rewording of 3(i):

- (a) the "future position" included documents relating to the preparation of even the respondent's current proposals on those particular issues in dispute;
- (b) the complainants were not seeking to obtain by way of subpoena documents relating to the language of the various proposals, i.e., the union's bottom line and "points above" apart from the specific proposals already actually tabled by the union;
- (c) while it was conceded the parties were not yet at impasse, the complainant was seeking by way of subpoena any document relating to the seniority/inter-store transfers proposal which touched on an intention by the union to proceed to impasse on those issues,.

16. In reply, counsel for the respondent disputed that *Shaw-Almex, supra*, required the production of documents before the party served with the subpoena could argue relevance, otherwise the *caveats* expressed in *Shaw-Almex* at paragraph 17 would be useless. Moreover, counsel stressed that the Board in *Becker, supra*, and *Master Insulation, supra*, had cut back the scope of the subpoena. Counsel also argued that, even if there was a plan to insist in joint bargaining, the fact that negotiations had actually occurred at individual locations meant that the material sought was irrelevant. In summary, counsel asked that the Board not order disclosure or, in the alternative, that the Board review each document before determining which, if any, should be disclosed.

17. The Board rejects the assertion of counsel for the complainants that the decision in *Shaw-Almex*, requires that all documents be produced for examination by the party serving the subpoena before the party served can challenge the propriety and scope of the subpoena. In *Becker Milk, supra*, for example, the Board, after considering the submissions of the parties, cut back the scope of the subpoena *duces tecum*. There is nothing improper in the respondent making submissions to the Board regarding the subpoena before producing the documentation.

18. Clearly, the subpoena *duces tecum* may not be used as a “fishing expedition” or to harass a party: see *Shaw-Almex, supra*, in particular and the cases cited therein. The party seeking documentation, however, need not demonstrate that the material sought is more than arguably relevant to the issues in dispute (see *Gordon-Nelson, supra*). As stated in *Shaw-Almex, supra*,

The ultimate relevance of the information sought need not and cannot be resolved at this stage. That is a matter the Board can determine only when all the evidence is in. It is enough that information in the documents might be relevant, and that the documents might be admissible. (See *Re Chelsea Inn*, (1979) 11 C.P.C. 239 (Ont Div. Ct.)).

19. What the complainants are alleging in this case is as follows:

The complainant states that the actions of the respondent in failing to meet within fifteen days of having provided the complainant with notice to bargain, and in making bargaining conditional upon joint bargaining with the employers, including making demands pertaining to the operations of other employers, constitutes a continuation of its premeditated course of conduct directed towards the delay and ultimate conclusion of a collective agreement all of which is contrary to the Act and in particular section 15.

(See letter dated January 25, 1985 from counsel for one of the complainants, Famz Foods.) The allegations of the other two complainants are identical.

20. In the Board’s view, the subpoena as originally drafted was too broad; documentation not arguably relevant to the allegations was included. Moreover, the Board must exercise considerable caution where a subpoena *duces tecum* extends to documents which are closely related to the preparation for and conduct of negotiations, particularly where the parties are still engaged in bargaining. The encouragement of the practice and procedure of collective bargaining, as expressed in the preamble to the *Labour Relations Act*, is fundamental to the legislation and should be protected by the Board. Although parties frequently resist production of documentation on the basis that such material is “confidential”, the Board does not protect such “confidentiality” (see generally, *Shaw-Almex, supra*, *Gordon-Nelson, supra*, and the cases referred to in both decisions). Nonetheless, disclosure is not without restriction. As stated in *Shaw-Almex, supra*, at page 670,

In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be used for collateral or ulterior purposes.

Notwithstanding the implied undertaking noted above, the Board stresses that some documentation, while relevant, may be so sensitive that the Board might well impose express and onerous restrictions as to disclosure on parties seeking documentation or their counsel. Further, the Board may well be reluctant to order disclosure before the stage in the proceedings where such disclosure is absolutely essential.

21. The decision of *Shaw-Almex, supra*, did not extend the rights of a party to seek documentation from another party by way of a subpoena *duces tecum*. Rather, *Shaw-Almex* stands for the proposition that the Board, if satisfied that the documentation is relevant and would be required to be produced by a witness during a hearing, could properly direct that the documentation be produced prior to the actual hearing. Through ordering the material,



as specified, deposited with the Registrar for view by the parties prior to the hearing, the Board could thereby expedite the proceedings. However, *Shaw-Almex* does not support an assertion that an issue of the relevance or existence of certain documentation should be resolved through ordering deposit of these documents with the Registrar.

22. In the instant case the complainants reiterated their intention not to seek documentation with respect to a wide range of bargaining issues; the proposed “amendment” to the subpoena (see paragraph 14 above) sought to restrict the scope of the subpoena. The Board, however, does not consider the proposed amendment to appropriately express the intended restrictions.

23. In the Board’s view, the parties were essentially asking the Board to direct production of the documents the Board regarded as appropriate in the context of the parties’ various submissions. Given the sensitivity of the documentation and the stage in the proceedings, the Board is not prepared to exercise its discretion, as in *Shaw-Almex, supra*, and order the documents deposited with the Registrar for review by the complainants before this matter comes on again for hearing. Rather, the Board directs that the witness Park bring such documentation as specified below to the next scheduled hearing. At that time, the complainants are to commence cross-examination of Park. The existence of any specific document, its relevance and actual production may be dealt with during the hearing on a document by document basis.

24. Having regard to all of the foregoing, the Board directs the witness Park to bring the following documentation to the next scheduled hearing:

all records, memoranda, correspondence and minutes in the possession, custody, power and/or control of the respondent,

- (i) discussing the respondent’s strategy, timing, positions and/or goals relating to bargaining on a joint, common, multi-employer or province-wide bargaining basis between the respondent and all owners, operators and/or franchisees who carry on business under the name and style of Swiss Chalet Bar-B-Q restaurant in the Province of Ontario;
  - (ii) relating to the seniority and/or inter-store transfer proposals which touch on the factual issue of whether the respondent formed an intention to proceed to impasse on these issues.
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**2787-84-U** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Complainant, v. **DiverseyWyandotte Inc.**, Respondent, v. Brewery Malt and Soft Drink Workers, Local 304, Intervener

**Duty to Bargain in Good Faith — Trusteeship — Unfair Labour Practice — Local union having bargaining rights placed under trusteeship — Validity of trusteeship subject of pending judicial review — Employer not breaching bargaining duty by refusing to bargain exclusively with trustee**

**BEFORE:** Robert D. Howe, Vice-Chairman, and Board Members F. W. Murray and P. Grasso.

**APPEARANCES:** *Chris G. Paliare and Linda Rothstein for the complainant; C. M. McKeown, Q.C., for the respondent; Paul Cavalluzzo, J. Cameron Nelson, and Patrick Macklem for the intervener.*

**DECISION OF THE BOARD;** March 12, 1985

1. The name of the respondent is amended to "Diversey Wyandotte Inc."
2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "National") alleges that the respondent (also referred to in this decision as the "Company") has contravened section 15 of the Act.
3. The intervener (also referred to in this decision as the "Local") holds bargaining rights in respect of a unit of the Company's employees. Negotiating sessions between the Local and the Company were held in September, October, and November of 1984. On November 12 the Local requested the appointment of a conciliation officer pursuant to section 16 of the Act. During October, November, and December, the Local took various steps in an effort to disaffiliate from the National. (Article XV of the Constitution sets forth a procedure by which a local union may disaffiliate from the National.) On December 13, a Trial Board appointed by the National Secretary-Treasurer recommended to the General Executive Board of the National that the Local be placed under trusteeship "to ensure that the disaffiliation procedure is carried out pursuant to the provisions of the National Union Constitution". The General Executive Board accepted that recommendation and purported to place the Local under trusteeship on December 20 by a declaration of trusteeship appointing Robert Booth (a staff representative with the Food and Beverage Council of the Canadian Labour Congress, and a member of the National) as trustee, "to succeed to perform all of the rights, powers and duties heretofore exercised and possessed by [the Local] and its officers, business agents, including the power to . . . negotiate agreements for and on behalf of [the Local]. . . ." On the afternoon of December 20, Mr. Booth delivered the declaration of trusteeship to Cameron Nelson, an elected business agent of the Local. Mr. Nelson advised Mr. Booth that in his view the trusteeship was illegal. Accordingly, he refused to give Mr. Booth possession of the office, books, records, and other property of the Local. On the following day, the 1,977 ballots cast by the members of the Local in the "disaffiliation vote" were counted. 1,871 of those ballots were marked in favour of disaffiliation, 101 were marked against it, and 5 were rejected as spoiled ballots.

4. S. G. Craig, who had been appointed as a conciliation officer in respect of the aforementioned negotiations, advised the parties that a conciliation meeting would be held on January 10, 1985. On January 8, counsel for the Company wrote to Victor Pathe, Assistant Deputy Minister of Labour, as follows:

We act for Diversey Wyandotte Inc., the employer in this matter.

Conciliation has been fixed for January 10, 1985 pursuant to the attached letter of Mr. S. Craig.

We are writing to express our concern with respect to the practicality of conciliation services on January 10, 1985. The request for conciliation services was submitted by the Union on November 12, 1984 and the employer did not object to the request at that time. Subsequently, the employer received a notice dated December 20 and December 21 purporting to place Local 304 in TRUSTEESHIP. By letter dated December 28, 1984 the business agent of Local 304 advised our client that the Trusteeship is invalid. Our client has also received a letter from the alleged "Trustee" claiming an interest in the Union dues.

The Conciliation Officer has a duty to confer with "the parties" and there is real uncertainty as to who speaks for the Union party at this time. Our client has real concern that it could seriously jeopardize its collective bargaining relationship if it is obliged to proceed with conciliation on January 10, 1985. For this reason we are writing to advise you and your Conciliation Officer that we will be asking for an adjournment of the conciliation meeting until this status question is resolved.

For your consideration we enclose copies of the following papers:

1. Copy of Declaration dated 20th December, 1984 of Secretary — Treasurer Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers.
2. Copy of letter of Robert Booth (Trustee) dated December 21, 1984.
3. Copy of letter of Cameron Nelson, Business Agent, Local 304 dated December 28, 1984.

5. The January 10 conciliation meeting was subsequently adjourned to January 28. In this regard, the Conciliation Officer sent the following letter to the parties on January 18:

Pursuant to my appointment as a Conciliation officer in respect of the above captioned matter, this is to advise that I shall hold a meeting on Monday, January 28, 1985, at 10:00 a.m. in a meeting room, Ministry of Labour, 400 University Avenue, 5th Floor, Toronto, Ontario.

I am asking the following persons to attend the meeting: John McNamee, Business Agent for Local Union No. 304, Robert Booth who purports to be the Trustee of Local 304, and C. M. McKeown, counsel for Diversey Wyandotte Inc. I am holding this meeting so that I may fulfill my obligation under Section 18(1) of the Labour Relations Act to "confer with the parties" in these negotiations. The current dispute between Local Union No. 304, the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers which places in question the status of Local 304, has made it difficult to ascertain who are the proper and lawful representatives of the bargaining agent and I wish to make every effort to ensure that I do "confer with the parties" through their proper and lawful representatives.

6. At the January 28 conciliation meeting (and at the hearing of this complaint), the Company took the position that it wished to remain neutral in respect of the dispute between the National and the Local. However, it also advised the Conciliation Officer that negotiations



could proceed if the National (through Mr. Booth) and the Local would agree that if a memorandum of settlement was ratified by the bargaining unit employees, they would both be bound by the result, subject to a determination of their respective rights by a court or tribunal of competent jurisdiction. When that proposition was put to Mr. Booth, he indicated that he could not accept it. Accordingly, it was not put to the Local, and the conciliation meeting was adjourned, to resume after the dispute between the National and the Local had been resolved.

7. On January 18, 1985, Mr. Nelson received the following letter from the solicitors for Carling O'Keefe Transport Limited, Labatts Ontario Breweries, and Molson Ontario Breweries Limited:

As you are aware, we are solicitors for the above three companies. Our clients have received certain telegrams and letters indicating that the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers has placed its Local 304 into trusteeship and is directing our clients to pay all funds due by them to Local 304, to the Trustee. Our clients have also received notification from officers of Local 304 of the Local's disaffiliation together with requests that the above funds be paid directly to the Local. Our clients are ready, willing and able to pay these dues to the proper party.

In light of these conflicting demands which the National Union through its Trustee, and the Local, are placing on these three companies with respect to the dues, we are hereby notifying both parties that these amounts will be deposited in bank accounts by each of the above companies to be held in escrow. We would suggest that the National Union and the Local Union resolve the dispute between themselves and forward to this office and/or the above companies a jointly executed Direction as to the disposition of these funds.

8. Shortly after receiving that letter, the Local took steps to file a judicial review application for an order in the nature of *certiorari* in respect of the actions of the Trial Board, the Secretary-Treasurer, and the General Executive Board, by which the National purported to place the Local under trusteeship. The grounds upon which the Local relies in challenging the validity of the trusteeship include acting contrary to the principles of natural justice, erring in law, acting in excess of jurisdiction, acting without jurisdiction, and ignoring procedural safeguards set out in the Constitution. The Local sought to have that application heard by a judge of the High Court (pursuant to section 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224), but it was transferred to the Divisional Court, on the agreement of counsel, as there was insufficient time for the judge to deal with it on February 8 (the day on which it was returnable), and as it appeared that the matter could be disposed of more quickly by Divisional Court than by the High Court.

9. The instant complaint was filed with the Board on January 17, 1985. It is the complainant's contention that the Company has contravened section 15 of the Act by refusing to meet and bargain exclusively with Mr. Booth. The sole relief sought by the complainant is a declaration that Mr. Booth is the trustee of the Local and that the Company must meet and bargain exclusively with Mr. Booth. The intervener, on the other hand, asks the Board to find the trusteeship to be invalid or, in the alternative, to defer to the Divisional Court proceedings and to make an interim order directing the Company to negotiate exclusively with the Local. Counsel for the Company submitted that his client has not contravened the Act, but also asked the Board to provide guidance to the parties concerning who is legally entitled to speak on behalf of the bargaining unit employees for purposes of collective bargaining.

10. Having considered all of the evidence and the able submissions of counsel, we have concluded that the Company has not contravened section 15 of the Act in the circumstances of this case. It is clear that the Company was quite willing to bargain in good faith and make

every reasonable effort to make a collective agreement. However, it was thwarted in its efforts to do so by the internal dispute between the National and the Local. There is no suggestion that the Company has been using that internal dispute as a pretext to avoid its bargaining duty. To the contrary, the Company was (and is) anxious to have that internal dispute resolved as expeditiously as possible so that bargaining may proceed. Indeed, the Company has asked the Board to express its view concerning who is entitled to speak for the Local for purposes of collective bargaining. While we are sensitive to the labour relations problems which the continuance of that dispute may entail, we are not persuaded that any comments by this Board concerning the validity of the trusteeship (or the disaffiliation vote) would resolve those problems, as our comments, which would be in the nature of *obiter dicta* in the circumstances of this case, would not be binding upon the parties. Moreover, such comments could cause substantial additional problems for the parties if negotiations proceeded on the basis of our opinion and that opinion was not ultimately shared by the Courts.

11. For the foregoing reasons, this complaint is hereby dismissed.

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### **1335-84-U Bernard Dorais, Complainant, v. The International Alliance of Theatrical and Stage Employees Local 257 Ottawa Ontario, Respondent**

**Duty of Fair Referral — Duty of Fair Representation — Unfair Labour Practice — Union opening up job for new bids — Whether decision or manner of making decision arbitrary, discriminatory or in bad faith — Different treatment of union members not discriminatory where justifiable explanation given**

**BEFORE:** Harry Freedman, Vice-Chairman.

**APPEARANCES;** Vicki Phillips, Bernard Dorais, Wayne Turcotte and Jack Harris for the complainant; John E. Johnson for the respondent.

**DECISION OF THE BOARD;** March 19, 1985

1. Bernard Dorais is a projectionist who works at the St. Laurent Theatre in Ottawa and has been employed there since November 15, 1981. He is a member of the respondent. The respondent has opened the job that Mr. Dorais occupies for bids. Members of the respondent who have more seniority, that is, who have been members of the respondent longer than Mr. Dorais, wish to bid on that open job and replace Mr. Dorais as the projectionist at the St. Laurent Theatre. Mr. Dorais objects to this course of action and has filed this complaint alleging a violation of sections 68 and 69 of the *Labour Relations Act*. The respondent, before taking any action to displace Mr. Dorais, awaits the outcome of this proceeding.

2. The respondent and Mr. Dorais' employer are bound by a collective agreement (exhibit #4) which requires the employer to only employ members of the respondent and obliges the respondent to supply the employer with competent persons to perform the work covered

by the collective agreement. Mr. Dorais works at the St. Laurent Theatre under that collective agreement.

3. Members of the respondent are assigned to jobs with employers bound by the collective agreement pursuant to the constitution of the respondent. (See exhibit #3.) Article 1 of the constitution, section 2 provides:

2. The objects of this Union shall be:

• • •

(d) To establish an employment register.

(e) To maintain seniority with respect to selecting and placing members in new or open jobs. The selection shall be governed by the length of continuous membership in Local 257 and competence of the applicant.

• • •

The parties agreed before me that the respondent has always applied the seniority and the competence rule set out in section 2(e) of article 1 of its constitution when filling jobs in new theatres or when filling jobs where a clear or uncontested vacancy existed.

4. The Business Agent and the Executive Board of the respondent have been assigned the responsibility of selecting members for jobs by article 5 of the respondent's constitution. Article 5, section 5 provides:

"Business Agent

• • •

(b) He shall place any member in temporary positions and must report to the Executive Board any member who accepts a position without his permission.

(c) All positions or relief work shall be filled by the Business Agent, being governed in the respect of new or open jobs by Article 1, Section 2 (e). NOTE: A relief position is one where the regular person is temporary [sic] unavailable."

Section 8 states:

"Executive Board

• • •

(b) They shall investigate all complaints of members and decide if possible upon all questions and disputes between employer and employee referred to them by the Business Agent, accepting any means toward an amicable settlement that may be deemed essential to the organization. This Board shall also decide on all matters referred to them by this Union, and their decision shall in all cases be binding, unless reversed by a majority vote of this Union at any regular or special meeting. The Executive Board shall act for the Local in the interim between meetings and shall have the authority to do any business that the organization can do and that is urgent, but must report all actions to the Local at its next regular meeting."

5. The selection of members for new or open jobs begins by members bidding for those jobs. Generally, the member of the respondent with the most seniority who bids for a job is



selected for it. Mr. Dorais became employed at the St. Laurent Theatre in November 1981 by bidding for the job. At that time, the St. Laurent Theatre employed two full-time projectionists, Mr. Dorais, who worked the smaller, No. 2 auditorium and Mr. Everette Proulx, who worked the larger, No. 1 auditorium at that theatre. Prior to December 1982, the two full-time projectionists each worked six shifts per week, and a relief projectionist worked three shifts of relief per week in each auditorium.

6. In December 1982, the St. Laurent Theatre became automated which reduced the amount of projectionist's work to be performed. After automation, the St. Laurent Theatre needed only nine shifts of projectionist's work per week. Thus, the job of one full-time projectionist was eliminated. At that time, Mr. Proulx, as the senior man in the theatre and a member of the respondent with a high seniority rank, could have claimed the only remaining full-time position. However, because of Mr. Proulx's age and poor health, he was either unable or unwilling to learn to operate the new automated equipment or perform the more strenuous duties required as a result of automation. Due to an arrangement between Mr. Dorais and Mr. Proulx, Mr. Dorais was paid for six shifts and Mr. Proulx was paid for three shifts of work per week, and Mr. Dorais came to work to assist Mr. Proulx on his shifts. During this period, Mr. Dorais had had conversations with Dalton Scheer, the Business Agent of the respondent, in which Mr. Scheer had indicated to Mr. Dorais that he thought Mr. Dorais was working as the relief man at the St. Laurent Theatre. Mr. Proulx retired in June, 1983. Mr. Dorais, who had been off work by reason of sickness for seven weeks starting in May, 1983 returned to work at the St. Laurent Theatre in late June or early July after Mr. Proulx had retired.

7. At the first regular monthly meeting of the respondent's membership after Mr. Proulx's retirement, the issue of whether the job occupied by Mr. Dorais at the St. Laurent Theatre was open was raised. Mr. Dorais, who had been scheduled to work a double shift on the day of the meeting, did not attend the meeting. Mr. Dorais had not been notified that the issue of whether the job which he had occupied since January was open would be raised. At that meeting, two votes on this issue were conducted. The first vote ended in a tie. The president of the respondent, who was chairman of that meeting, did not vote to break the tie, but ruled that a second vote should be held. The second vote resulted in a majority voting in favour of the St. Laurent job occupied by Mr. Dorais being opened for bids.

8. When Mr. Dorais was advised of the decision of the union reached at that meeting, he retained legal counsel. The respondent, after also being advised by legal counsel, convened a meeting of its Executive Board in November 1983 to hear Mr. Dorais' submissions with respect to the St. Laurent Theatre job. The Executive Board received submissions from Mr. Dorais and his representative. It advised them that the Board would make its recommendation to the membership at the next regular monthly meeting. The next scheduled meeting of the respondent's members was in December, 1983. That meeting was taken up entirely with the conduct of elections so that the St. Laurent Theatre job issue was not reached. At the next meeting of the respondent's membership in January 1984, the Executive Board recommended that the job at the St. Laurent Theatre be opened for bids. Mr. Dorais was in attendance at that meeting and had a representative speak on his behalf. The issue was fully debated, following which a vote was conducted with a majority (13 to 10) voting in favor of the job being opened for bids. (See Exhibit #9, page 3.)

9. Following that meeting, Mr. Dorais appealed the respondent's decision to the International President of the The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (I.A.T.S.E.), the parent organiza-

tion of the respondent, who delegated the appeal to an International Representative, Ms. Barbara W. Robinson. She dismissed the appeal of Mr. Dorais after receiving and considering his written submissions. (See exhibit #2, page 6.) Mr. Dorais then appealed the International Representative's decision to the General Executive Board of I.A.T.S.E. The General Executive Board, after hearing submissions from a representative of Mr. Dorais and of the respondent, denied Mr. Dorais' appeal. This complaint was filed shortly thereafter.

10. Counsel for Mr. Dorais advanced two main arguments for contending that the respondent had acted contrary to sections 68 and 69 of the *Labour Relations Act*. Her first main argument was based on the meeting of September 1983, and principally on the fact that Mr. Dorais had not received notice that the issue of whether the job he occupied should be opened for bids would be discussed at the meeting. She argued that since he was not present at that meeting, the issue should not have been raised. Furthermore, she submitted that had he been present, the first vote which ended in a tie in his absence, would have resulted in a majority voting against opening his job for bids. In any event, a tie vote is a defeat, she argued, and therefore that first vote should have ended the matter. She argued that no subsequent vote to open the job should have been taken and therefore all of the respondent's subsequent actions were improper.

11. The second main argument made by counsel for Mr. Dorais was that the respondent's decision to open the St. Laurent Theatre job for bids was both arbitrary and discriminatory. I heard detailed evidence concerning the manner in which projectionists had continued working at a number of theatres within the geographic jurisdiction of the respondent where a reduction in the number of shifts worked had occurred after automation or lock-outs, thereby reducing the number of projectionists employed at those theatres. It is not necessary to recite that evidence within this decision. I am satisfied that at the Elgin Theatre and Somerset Theatre, the persons who remained in the jobs were members of the respondent longer than any other members of the respondent who would have been interested in bidding for those jobs. After automation occurred at the Britannia Six Theatres, the two full-time projectionists who had more seniority than the third projectionist who lost his full-time job there because of lack of work, shared the remaining work. At the Kanata Theatre and Vanier Theatre, where lock-outs occurred, during or shortly after the lock-outs, the senior projectionists employed at each theatre left their employment at those theatres for other jobs. The junior projectionist employed at each of those two theatres occupied the remaining full-time position. The jobs at those theatres were not opened for bids after the lock-out ended. In my view, the situation at the Kanata Theatre and Vanier Theatre is indistinguishable in principle from the situation at the St. Laurent Theatre which is before me.

12. During final argument, I did not call on counsel for the respondent to respond to Mr. Dorais' counsel's first main argument. I am satisfied that if the conduct of the September meeting had been improper, unfair, or caused an injustice to Mr. Dorais, the respondent's subsequent actions of convening an Executive Board meeting and then dealing with the matter anew at the membership meeting in January, 1984 rectified any impropriety or procedural unfairness that might have occurred. Mr. Dorais had been given ample opportunity, both on his own, and through his representatives, to present submissions outlining his position to both the respondent's Executive Board and membership. In my view, the opportunity the respondent provided to Mr. Dorais to deal with the St. Laurent job issue from a fresh start at both the Executive Board level and membership level remedied the impact on Mr. Dorais of the decision taken at the respondent's meeting in September 1983.

13. Counsel for the complainant argued that the decision to declare the job open was arbitrary because the respondent interpreted its constitution in a patently unreasonable manner, or simply ignored the relevant facts. She referred me to Brown, R.E., "*The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests Under the Duty of Fair Representation in Ontario*", (1982), 60 Can. Bar. Rev. 412 at 440-441, 443, to describe arbitrary action by a union as conduct demonstrating an uncaring attitude or ignoring the issues that have been put before it for consideration. She also cited *Princesdomu v. CUPE Local 1000 and Ontario Hydro*, [1975] OLRB Rep. May 444, and *RCA Limited*, [1974] OLRB Rep. Jan 60.

14. Counsel for the respondent argued that the respondent had not only directed its attention to all of the relevant issues concerning Mr. Dorais and the job he held at the St. Laurent Theatre, but had carefully considered and reconsidered those issues, by putting them before both its Executive Board and its membership. He submitted that the respondent's determination had been appealed through the respondent's appeal processes, and in any event, its interpretation of its constitution was reasonable.

15. In my opinion, the respondent made a reasonable assessment of the circumstances at the St. Laurent Theatre during the first part of 1983 when it concluded that a job at the St. Laurent Theatre was open after Mr. Proulx was unable or unwilling to work in the only remaining full-time position at the St. Laurent Theatre. Section 2(e) of article 1 of the respondent's constitution is not clear. Nevertheless, I am satisfied that the respondent, through its Executive Board and membership carefully considered the relevant facts, the constitution and Mr. Dorais' position and submissions, including his argument based on what had taken place at the Kanata and Vanier Theatres, and concluded that Mr. Dorais had not properly filled Mr. Proulx's job after automation or on Mr. Proulx's retirement but rather, Mr. Proulx's full-time job had become vacant when he was unable or unwilling to work as the full-time projectionist. While the full-time job was not opened for bids until after Mr. Proulx retired, Mr. Dorais would have had the benefit of occupying that position to the exclusion of the respondent's members with more seniority than him until that job is filled through the bid process. The interpretation and factual issues were argued and dealt with at two different appeal levels within the respondent's parent union which received all of the submissions that Mr. Dorais wished to make on those issues, considered those submissions in arriving at its decisions and delivered written decisions with reasons responding to those submissions. (See exhibit #2.) The Board in *Savage Shoes Limited*, [1983] OLRB Rep. Dec. 2067 held, at page 2076-77, that the term arbitrary "... describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand." I therefore find that because the respondent had specifically addressed itself, at both the local and parent union levels, to the considerations necessary in arriving at a reasonable decision on the matter of whether the job occupied by Mr. Dorais at the St. Laurent Theatre was open, it did not act arbitrarily.

16. There was no evidence before me upon which I could find even a hint of malice or improper motivation directed at Mr. Dorais by the respondent. Therefore, I find that the respondent did not act in bad faith in this matter.

17. Counsel for Mr. Dorais also argued that Mr. Dorais was adversely affected by the respondent's conduct which was discriminatory in result, and relies on *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779 as authority for suggesting that such conduct, even in the absence of discriminatory intent, is discriminatory action within the meaning of



sections 68 and 69 of the *Labour Relations Act*. The Board in that case was asked to determine whether the trade union, by obtaining the inclusion of a "super-seniority" clause in a collective agreement which gave preference to Zone Committeemen and Shop Stewards was acting in a discriminatory manner contrary to section 60 [now 68] of the Act. The Board, although finding that the union did not engage in discriminatory conduct directed against the complainant, was required to determine whether, in the absence of discriminatory intent, there can be discriminatory conduct contrary to section 68. The Board wrote at page 789:

"To summarize the position of the Board, therefore, we suggest that 'discriminatory' in section 60 [now 68] is designed to prevent distinctions in treatment accorded individual employees or groups of employees which are made without the support of cogent labour relations reasons. The focus of the concern is on the distinction itself rather than on the motive for the distinction."

The Board in *Savage Shoes Limited*, *supra*, comments similarly on the word "discriminatory" at page 2076:

"The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns."

18. The entire basis for counsel's submission that the respondent acted in a discriminatory manner in relation to Mr. Dorais rests on what had occurred at the other Ottawa area theatres referred to earlier. I find that all the situations referred to by counsel, other than the one at the Kanata and Vanier Theatres are clearly different from the one at the St. Laurent Theatre. Therefore, I must determine whether the failure or refusal of the respondent to open the jobs at the Vanier and Kanata Theatres for bids after the lock-out was settled and the senior projectionists employed in each of those theatres left for other jobs, established a precedent, the deviation from which is discriminatory conduct.

19. Mr. Dorais has been treated differently than the respondent's two members who continued to work at the Vanier and Kanata Theatres after the lock-out. However, in my view, different treatment does not always equal discriminatory conduct that is contrary to section 68 or 69 of the *Labour Relations Act*. If that were so, every time a trade union treated one employee in a bargaining unit differently from another bargaining unit employee, a violation of section 68 the Act would occur. Employees may be treated differently by their union based on, for example, their job functions, length of service, employment status and other similar factors. Different treatment based on those grounds alone would not give rise to even a *prima facie* violation of the Act. However, differences in treatment which are not patently justifiable may call for an explanation from the trade union.

20. Kenneth Wall, the Treasurer of the respondent, testified that the issue of whether the jobs at the Vanier and Kanata Theatres were open when the senior projectionists successfully bid for jobs at other theatres was raised by Mr. Wall and another member with the union executive at the time that that situation arose. They were unsuccessful in having the jobs opened for bids because of opposition from the president of the respondent. Following the union executive's decision not to open those jobs for bids, the executive moved a vote of non-confidence in the Business Agent, Mr. Scheer, which was defeated. The President and the Secretary of the respondent then resigned and a new executive, which included Mr. Wall was elected shortly afterwards. The first time the respondent's new executive was faced with a problem similar to the Kanata and Vanier Theatres was when the issue of the St. Laurent Theatre job was raised. It was the view of Mr. Wall that the job at the St. Laurent Theatre should be opened for bids

because the senior projectionist working at that theatre had left, and it was also his view that the jobs at both the Kanata and Vanier Theatres should have been opened for bids on that same principle.

21. Mr. Wall's position is reasonable. Indeed, if at the Vanier, Kanata or St. Laurent Theatres, the senior projectionists had worked, for even a short period of time in the remaining full-time position, the junior projectionists employed there would have been laid off from their full-time jobs at those theatres. If the senior projectionists left their employment after the lay-off of the junior projectionists, I believe that there would be no dispute about the jobs vacated by the senior projectionists being opened for bids. In my opinion, it was simply fortuitous that the senior projectionists at those three theatres left their jobs at about the same time as the number of remaining jobs was reduced.

22. I am satisfied on the evidence that the respondent assessed the St. Laurent Theatre job as a matter of principle in interpreting its own constitution. This view is reinforced by having regard to the decision of Ms. Robinson in which she made it clear that her decision on appeal was a matter of constitutional principle. She wrote:

"In the opinion of the undersigned, when the booth was automated in December of 1982 and caused the elimination of one of the two projectionist jobs, since Brother Proulx was the senior man, the job held by you was in effect eliminated. No arrangement between you and Brother Proulx *can supersede the constitutional requirement that open or new jobs be filled on the basis of seniority and bidding*. Therefore, viewing the matter as it stood in December 1982, the situation must be treated as if your job was eliminated at that point in time."

The respondent deliberately chose not to follow the decision taken by its previous executive because the current executive and Mr. Wall in particular thought that the previous executive's decision was contrary to the union's constitution, and it is apparent that the majority of the respondent's membership agreed with that view.

23. It was open to the respondent not to follow the action taken by its previous executive in relation to an isolated case. The decision to do so was not capricious, but was made after due consideration of the competing policies. The respondent has established why Mr. Dorais was treated differently from its two members at the Kanata and Vanier Theatres. That difference in treatment was not discriminatory within the meaning of section 68 or 69 of the Act, because, in my opinion, the respondent has come forward with a reasonable explanation, based on "cogent labour relations reasons" or "legitimate collective bargaining concerns" for that difference.

24. For the foregoing reasons, this complaint is hereby dismissed.

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**0671-84-U Zorika Flanjak, Complainant, v. Local 310, Amalgamated Clothing & Textile Workers Union (Shoe Division) and Greb Industries, A Division of Warrington, Inc., Respondents**

**Duty of Fair Representation — Unfair Labour Practice — Union practice for executive to decide whether to arbitrate grievances — Failure to refer question to membership not unlawful — Union official's unawareness of possible legal argument not constituting arbitrariness — Effect of complainant's lack of candour with union**

**BEFORE:** Robert D. Howe, Vice-Chairman.

**APPEARANCES:** *Mark Grossman and Zorika Flanjak for the complainant; David A. McKee, Brian T. Michaud and Basil Gordon for the respondent trade union; Richard Nixon and Jim Litwiller for the respondent company.*

**DECISION OF THE BOARD;** March 19, 1985

1. The names of the respondents are hereby amended to "Local 310, Amalgamated Clothing & Textile Workers Union (Shoe Division)" and "Greb Industries, A Division of Warrington, Inc." For ease of reference, the respondents will be referred to in this decision as the "Union" and the "Company".

2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that she has been dealt with by the Union contrary to section 68 of the Act, which provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

*[Lengthy review of evidence omitted: Editor]*

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50. Counsel for the complainant initially alleged that the Union had acted arbitrarily, discriminatorily, and in bad faith. However, at the commencement of his argument on January 15, 1985, he conceded that there was no evidence of discrimination or bad faith. Thus, the case was argued solely on the basis of arbitrariness. In considering the scope of that term in the context of section 68, the Board wrote as follows in *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001:

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" — bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute. The standard to which



a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

"40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546."

Similar views were expressed in *Re: Ontario Hydro Employees' Union — CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462 ff. in a long passage which canvassed the intended meaning of the word "arbitrary":

"In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word "perfunctory" and observed that a trade union, "in a non arbitrary manner [must] make decisions as to the merits of particular grievances". It could be said that this description of the duty requires the exclusive bargaining agent to put "its mind" to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness. . . .

On the other hand we do not believe, at least at this time that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances — errors consistent with a "not caring" attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct."

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that

is "implausible" or "so reckless other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

See also *Smith & Stone (1982) Inc.*, [1984] OLRB Rep. Nov. 1609; *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920; 5 Can. LRB (N.S.) 108; *Bedard Girard Ontario Limited*, [1981] OLRB Rep. Oct. 1338; *Leonard Murphy*, [1977] OLRB Rep. March 146; *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791; and *International Woodworkers of America Local 2-700*, [1972] OLRB Rep. Oct. 916. See also R. E. Brown, *The "Arbitrary", "Discriminatory" and "Bad Faith" Tests Under the Duty of Fair Representation in Ontario* (1982), 60 C.B.R. 412 at pp. 440-448.

51. Complainant's counsel submitted that the Board should find the Union to have arbitrarily represented the complainant by permitting the decision not to refer her grievance to arbitration to be made by the Union Committee, without providing for a right of appeal from that decision to the membership. However, it was Mr. Michaud's uncontradicted evidence that such decisions have always been made by the Committee and have never been taken to the membership. In this regard, I find there to be no merit in counsel's submission that the absence of such an appeal is itself a violation of the section 68 prohibition against arbitrary representation. The Board has long recognized that the procedures utilized by a union in disposing of grievances vary from union to union, and that an attempt by the Board to impose uniformity could create chaos in union procedures. (See, for example, *RCA Limited, Prescott, Ontario*, [1974] OLRB Rep. Jan. 60.) Thus, it is open to a trade union to permit decisions concerning whether or not to arbitrate particular grievances to be made by a committee rather than by the general membership. Such a procedure may reflect the desire of the membership to have such decisions made by persons who, through experience or training, have developed greater expertise than other members concerning such matters, or by persons with greater familiarity with the merits of the grievance and the terms of the collective agreement. It may also reflect a need to delegate decision-making functions in the interests of efficiently operating a local which handles many grievances or is heavily involved in other activities such as collective bargaining or organizational activities. Mr. Michaud's evidence (on cross-examination by complainant's counsel) is instructive in this regard. He testified: "The membership elects the Committee and entrusts the Committee with decision-making power. If you had 250 people telling you what to do you'd never get anything done."

52. Complainant's counsel further submitted that a breach of section 68 should be found on the basis that Union officials did not advise the complainant of the appeal provisions set forth in Article XII of the Constitution of the Amalgamated Clothing & Textile Workers Union. However, it is clear that the complainant suffered no harm or prejudice as a result of not being apprised of that constitutional provision since, as conceded by her counsel in argument, the travelling expenses and other costs that would have been involved in pursuing an appeal under those provisions rendered them impractical in the circumstances of this case. Thus, it is unnecessary for the Board to decide the academic issue of whether failing to advise the grievor of that avenue of appeal constituted a breach of section 68.

53. Counsel for the complainant acknowledged that a trade union is not required by section 68 to consult with a lawyer before deciding not to pursue a grievance to the final step of the grievance procedure or to arbitration, but he contended that the Union contravened section 68 in the instant case by arbitrarily declining to accept an offer of free legal advice.

However, there is no evidence before the Board that any such offer was ever made. The evidence merely indicates that complainant's counsel spoke with Mr. Michaud on the telephone in an attempt to obtain information from him concerning her grievance, and wrote to Mr. Michaud on May 14, 1984, to request that "a third step grievance" be filed on behalf of the complainant. In that letter complainant's counsel also indicated that he would recommend that the complainant proceed against the Union under 89 of the *Labour Relations Act* unless Mr. Michaud agreed to pursue the matter further.

54. The complainant was not candid with her Union representatives in a number of respects. As noted above, it was not until the second step meeting that she suggested that the absence of Dr. Pizans on vacation was the reason that she had failed to provide the required medical documentation in a timely fashion. Up to that point, her sole explanation to the Union (and the Company) had been that her doctor had refused to provide it and had told her that she did not have to provide the information requested by the Company because he had more authority than the Company. In this regard, it should be noted that the issue of why the complainant had failed to provide adequate medical documentation in a timely manner was, to the knowledge of all concerned (including the complainant), one of the key issues in respect of the merits of her grievance. The complainant also did not tell her Union representatives that she was pregnant. Indeed, Mr. Michaud did not find that out until the first day of hearing of this complaint. While that fact would not itself have been determinative, the complainant's failure to divulge it reflects her unwillingness to candidly apprise the committee of all of the facts which might be pertinent to her grievance. As noted by the Board in the *Regional Municipality of Durham*, [1979] OLRB Rep. Dec. 1277, at paragraph 26, "[employees] who expect a standard of fairness from their trade union must be prepared to deal fairly with their trade union as well." As further noted in that case, a grievor's lack of openness or candour with his or her union representatives is wholly unacceptable as it may lead to a situation in which "the employer can never be certain to what extent the union itself has knowledge of the true facts, and the union's credibility may thereby be undermined, to the great detriment of other members of the bargaining unit and the trade union's continuing relationship with the employer."

55. At all material times, Mr. Michaud was unaware of the provisions of section 44(9) of the *Labour Relations Act*. Thus, he did not give any consideration to the issue of whether, through arbitration, a lesser penalty might be substituted for the complainant's termination. In this regard, it was his understanding (from his involvement in various arbitration proceedings launched by the Union) that an arbitrator "could not rule outside of a collective agreement" or change its terms, and, therefore, could only give relief to a grievor if the Company was found to have violated a specific provision in the collective agreement. Thus, he saw "compassionate grounds" as being the only basis on which the Company's actions could be challenged, and he did not think such challenge would succeed in view of the complainant's lack of candour and failure to provide the Company with proper medical documentation in a timely manner. Mr. Michaud's lack of awareness of that provision is somewhat troubling. However, as noted above, Mr. Gordon was aware that an arbitrator had such power in some circumstances but concluded, after considering the merits of the grievance on the basis of all of the information which he received from Mr. Michaud, the other members of the Union Committee, the complainant, and members of management, that an arbitrator would be unlikely to exercise such power in respect of the complainant's termination in view of the provisions of Article 17.02 by which an employee whose leave of absence for illness or injury expires before he (or she) is ready to return to work "shall be classed as a resignation as of the last day of his approved leave of absence." As submitted by Company counsel, it is open to question whether section



44(9) would empower an arbitrator to override that provision. Under the circumstances, although the matter is not entirely free of doubt, I have concluded on balance that it cannot legitimately be said that the failure by the Union Committee and Mr. Gordon to give greater consideration to the applicability of section 44(9) constituted arbitrary representation of the complainant in the circumstances of this case. The same is true of Mr. Michaud's failure to advance as an argument on behalf of the complainant the distinction (noted by complainant's counsel) between termination and resignation. As indicated by the Board in the *Smith & Stone (1982) Inc.* case (*supra*), the mere fact that a union representative is not aware of a possible argument, or does not discover such argument, does not amount to arbitrariness. (In that case, a U.A.W. International Representative who presented a grievor's case at arbitration was unaware of an "emerging body of case law" under which a probationary employee may have a right to grieve his or her discharge under a collective agreement which purports to deny such employees access to grievance and arbitration procedures.) Having regard to the totality of the evidence, I am satisfied that the fact that Mr. Michaud did not discern or advance that argument in the circumstances of this case does not support a finding of a "non-caring attitude" or a "summary approach" that can be considered to be "reckless, capricious or grossly negligent". Taken at its highest, it constituted only a mistake or error in judgment which did not amount to a breach of section 68.

56. Having carefully reviewed and considered all of the evidence and the submissions of the parties, I have concluded that the complainant has not established a contravention of section 68. The evidence as a whole indicates that Mr. Michaud and the other Union officials involved in handling the complainant's grievance directed their minds to that grievance and concluded, after attempting to persuade the Company to restore the complainant's employment, that it would be fruitless to pursue the grievance beyond the second step. In reaching that conclusion, they considered the pertinent provisions of the collective agreement, including Articles 8.01 and 17.02, and their understanding of the meaning of Article 17.02, gained through the negotiations which resulted in that rather unique language. They also considered the plausibility of the various reasons advanced by the complainant for failing to provide adequate medical documentation in a timely manner, and the fact that those reasons had changed during the course of the grievance procedure. They also attempted to persuade the Company to restore the complainant's employment on compassionate grounds, but those efforts, including a private meeting between Mr. Michaud and Mr. Sperling, were unsuccessful. The basis of their decision not to proceed to the third step before deciding against arbitration was their past experience which indicated that a grievance would never be allowed at that stage unless it involved a clear violation of the collective agreement, which they had concluded, with the assistance of Mr. Gordon, that the complainant's did not. If I were to direct the Union to proceed to the third step or to arbitrate the grievance in the circumstances of this case, I would be "second guessing" the Union Committee's decision on the basis of medical evidence not available to Union officials at the time of their decision, and on the basis of extensive legal submissions concerning the merits of the grievance, presented by the three capable lawyers who represented the respective parties in these proceedings, which submissions were also not before the Union Committee. Such "second guessing" would be inappropriate for, as noted by the Board in *Ford Motor "Company Limited (supra)*, the standard applied by the Board in cases of this type is not "based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits".

57. In view of my conclusion that no contravention of section 68 of the Act has been proved, it is unnecessary for me to decide whether, as contended by Company counsel, the Board lacks jurisdiction under section 89 of the Act to direct that a grievance be arbitrated on its

merits, notwithstanding the timeliness and other provisions of a collective agreement which might otherwise preclude the arbitration of such grievance on its merits.

58. For the foregoing reasons, this complaint is hereby dismissed.

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**2310-83-U John Glykis, Complainant, v. Hotel Employees Restaurant Employees Union, Local 75 and The Four Seasons Hotels Limited (Inn on the Park), Respondents**

**Duty of Fair Representation — Practice and Procedure — Reconsideration — Remedies — Unfair Labour Practice — Costs awarded only where extraordinary circumstances or overriding policy considerations — Union found in breach of representation duty in manner crucial union meetings conducted — Not conferring grievor automatic right to have grievance arbitrated — Right to retain own counsel at arbitration refused where union breach resulting from gross negligence — No reconsideration**

BEFORE: Corinne F. Murray, Vice-Chairman.

**DECISION OF THE BOARD;** March 22, 1985

1. On October 31, 1984, a decision was issued in this matter (see *Four Seasons Hotels Limited (Inn on the Park)*, [1984] OLRB Rep. Nov. 1406), in which the Board concluded that the respondent union (hereinafter "the union") had contravened section 68 of the *Labour Relations Act*, in the manner it handled the complainant's termination from his employment with the respondent hotel (hereinafter "the hotel"). Specifically, the Board found that the union's failure to inform the complainant, in a proper manner, as to the time two crucial union meetings were being held to consider the complainant's grievance, constituted gross negligence, and, therefore, arbitrary within the meaning of section 68. By way of remedy, the Board directed that the complainant be extended an opportunity to attend at the next scheduled executive and membership meetings and present his case with or without the assistance of his counsel. The Board further directed that the hotel waive the time limits of the collective agreement, should the executive or membership decide to refer the complainant's grievance to arbitration.

2. Subsequent to the issuance of the Board's decision, the Board received a letter dated November 19, 1984, from counsel for the complainant, the text of which was as follows:

Please be advised that we have received the decision dated November 8, 1984, with respect to the above-noted matter.

After reviewing this decision, we would ask that the Ontario Labour Relations Board reconsider its decision pursuant to Section 106 of the *Labour Relations Act*, as amended.

This request for reconsideration involves a number of items as follows:

1. There was no reference to the issue of costs. You will note that in our submissions we requested that Mr. Glykis be granted costs for the application under Section 89 of the *Labour Relations Act*;

2. The decision states that Mr. Glykis is to reapply for arbitration before his own union. As stated in our submissions, we asked that the Board consider the evidence it has heard and arbitrate the matter itself, that an Order be granted and that Mr. Glykis be reinstated to his employment and compensated for his loss of income and damages. In the alternative, we asked at the time the submissions were made that the Board refer the grievance to arbitration itself. In the circumstances, we ask that this be done rather than having Mr. Glykis reapply to the union to hear his case requesting arbitration.

As Mr. Glykis and his union have been adversaries, it is very questionable, after all that has transpired, as to whether or not the union could be impartial in this matter.

There was also a request that if the matter were re-submitted to arbitration Mr. Glykis have an opportunity to have his own counsel represent him at the hearing rather than counsel for the union, again on the basis that there would be an appearance of bias if the solicitors who acted for the union with respect to the complaint herein were to represent Mr. Glykis through the union in his arbitration hearing.

We feel it goes without saying that if this matter is referred to arbitration by the Board on the basis that Mr. Glykis is to retain solicitors of his own choosing then the union ought to bear Mr. Glykis' legal expenses. Again this was raised in our submissions.

More importantly, we would ask that the Order be amended to include a provision that the Board remain seized of this particular matter with respect to the arbitration procedure in order that the Board may intervene should the union not fairly represent Mr. Glykis' interests during the course of arbitration. This would be in view of the fact that Mr. Glykis and his union have been adversaries.

The request that the union bear all of the costs of the hearing before the Board and any subsequent proceedings is based on the fact that it is unfair that due to the union's breach of the Labour Relations Act Mr. Glykis would have to bear any legal expense for the enforcement and protection of his rights.

If you have any questions, please feel free to contact the writer.

The Board forwarded copies of this letter to the union and the hotel for their comments.

3. By letter dated December 12, 1984, counsel for the union responded as follows:

I am writing in response to your letter of December 7, requesting a reply to Mr. Carlisi's letter of November 19.

In our respectful view, nothing unusual occurred in this case which would warrant a departure from the Board's accepted practices of declining to award costs. Indeed, there is some doubt as to whether the Board has the jurisdictional power to award costs in view of the fact that the Act does not confer any specific authority in this respect. On this point, I would refer the Board to the unreported decision of the Supreme Court of Canada dated November 22, 1984, in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board v. Canadian Broadcasting Corporation*.

With respect to Mr. Carlisi's claim that the Board ought to have ordered the Union to take the case to arbitration, the following observations are submitted.

1. This claim was argued in Mr. Carlisi's original submissions and no additional evidence or circumstances have been presented warranting a reconsideration of the Board's decision on this claim.

2. This claim is inconsistent with the nub of the case presented to the Board to the effect that the Union's error lay in not providing to Mr. Glykis an opportunity to present his position to the Executive Board and the Union membership as a whole.



3. The Board's order in its decision is directly responsive to the complaint of Mr. Glykis as described above.

4. To have the Board order the Union to refer the matter to arbitration has the effect of superseding the right of the Union membership to conduct its affairs within the requirements of s. 68 of the Act.

5. Nothing in the evidence warrants the assumption that the Union membership and the Union Executive Board is unable to give a fair hearing to Mr. Glykis. Furthermore, the suggestion that Mr. Glykis and the Union have been adversaries in the past is inconsistent with the record of grievances, including an arbitration hearing, conducted by the Union on behalf of Mr. Glykis prior to the events giving rise to the instant case.

For the foregoing reasons, we respectfully submit that the Board's decision ought not to be reconsidered. Furthermore, we would advise that the hearing before the Executive Board is scheduled to take place shortly and the hearing before the General Membership will take place in the meeting scheduled for the month of January. Our client has been unable to contact the grievor through his last known address, but has managed to alert the grievor of these events by a letter sent in care of Mr. Carlisi.

4. By letter dated December 28, 1984, counsel for the hotel responded as follows:

We are solicitors for Inn on the Park, the Employer in the above-noted proceedings, and have recently been retained to act on its behalf with respect to the complainant's request for reconsideration herein. We therefore request that a copy of all future correspondence and documentation be addressed to the writer as well as to Ms. Dolores Zimak, on behalf of the Employer.

On behalf of the Employer we wish to reply to the complainant's request for reconsideration as follows. In accordance with the Board's well-established policy in respect of requests for reconsideration, it is submitted that the Board should not reconsider its decision unless the complainant proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and which would be practically conclusive, or if the complainant seeks to make representations which he had no opportunity to raise previously. The complainant cannot fulfill these criteria in this case. The complainant does not suggest that it wishes to present new evidence which was not previously available, and he was accorded every opportunity to make full submissions at the previous hearing of this matter. We note that the complainant was indeed represented by Counsel at the previous hearing and took advantage of his right to present evidence and make representations through Counsel.

We agree with Counsel for the Union when he suggests that nothing in the evidence warrants the assumption that the Union is unable to treat Mr. Glykis fairly. To the contrary, it appears that the Union has in the past represented Mr. Glykis in countless complaints, grievances and Arbitration proceedings.

In summary, we respectfully submit that there is no basis for reconsidering the Board's decision in this matter.

5. The Board's jurisdiction to reconsider its own decisions is found in section 106(1) of the Act which reads as follows:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

6. The principles which guide the Board in the exercise of its reconsideration powers are summarized in the following terms in its decision in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, at paragraph 4:

To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened.

Due to the wide-ranging nature of the complainant's counsel's letter, I have treated it not only as a request for reconsideration, but also as a request for reasons for rejection of some of the remedies sought by the complainant.

7. With this in mind, I will consider the matters raised by the complainant's counsel in the order they are dealt with in his letter. I did not grant the complainant's request that he be compensated for the "costs" incurred in his pursuit of the unfair labour practice complaint because it is the Board's general practice, in exercising its remedial powers under section 89, not to grant costs to the successful party. The Board has, in other cases prior to the complainant's, thoroughly canvassed the policy issues involved in this remedial area and has determined that there must be extraordinary circumstances or other overriding policy considerations before costs will be awarded to the successful party in a section 89 complaint (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755 for a fuller statement of the Board's rulings). Neither of these conditions was present in the complainant's case and it was no different, for the purposes of an award of costs, from the numerous cases in which the Board finds a violation of the Act. It was for this reason that I rejected the request for an award of "costs". Nothing in the letter requesting reconsideration causes me to change this aspect of the decision of October 31, 1984.

8. In requesting that the Board arbitrate the complainant's discharge grievance itself or refer the grievance to arbitration directly, rather than resubmit the grievance for consideration by the union executive and membership, counsel is again merely repeating the submissions made at the hearing. The Board has stated on numerous occasions that success in proving that section 68 has been breached does not automatically confer on the complainant the right to have his grievance arbitrated (see, for example, *Massey-Ferguson*, [1977] OLRB Rep. April 216; *Bedard Girard*, [1981] OLRB Rep. Oct. 1338). Where the Board does grant such a remedy, the Board, in normal circumstances, does not assume the task of arbitrating the grievance itself because of the longstanding policy of deferring to the arbitration process of the collective agreement where such process will yield a complete remedy (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). In this case the loss to the complainant resulting from the contravention of section 68 of the Act was the deprivation of the opportunity to be present at the executive and membership meetings and present his case. As the Board noted at paragraph 16, the complainant "clearly missed an opportunity which he should have had and could have had according to internal union procedures if he had been given clear times and places of these meetings". The Board's remedial order directly addresses this "loss". Therefore, on this basis alone, I do not consider it necessary to change my decision regarding the request for arbitration. In any event, this aspect of the complainant's reconsideration request has been overtaken by

events. A copy of a letter dated January 10, 1985, written by counsel for the complainant to the union and forwarded to the Board, indicates that the complainant was provided an opportunity to present his case to the union membership, and that the membership voted to overrule the executive board's decision. As a result, the complainant's grievance was to be referred to arbitration immediately. Even if it could be said that I was wrong in not ordering arbitration, the action of the membership of the union has removed any necessity for the Board to reconsider the adequacy of its remedy of returning the grievance to the normal union procedures as compared with the requested remedy of arbitration.

9. The complainant also requested at the hearing that, if the matter proceeds to arbitration, he should have the opportunity to retain his own counsel to present the arbitration on his behalf. This request has also been repeated in the application for reconsideration. The Board did not see then, and does not see now, any justification for such a claim. Nothing in the evidence suggests any malice or ill will towards the complainant by officials of the union. The wrongdoing attributed to the union stemmed from "gross negligence". On the contrary, as indicated in paragraph 3 of the Board's decision, the complainant has received the union's assistance without complaint on many previous occasions. The assistance rendered by the respondent following the complainant's termination in October of 1983, though falling below the standard required by section 68, was not tinged in any way by bad faith or active opposition to the grievor himself. I am not prepared, in the circumstances, to assume that the union will not provide proper representation to the grievor should the matter proceed to arbitration. This is consistent with the Board's jurisprudence. The Board stated in *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865, at paragraph 3:

... Where the Board does grant such remedy [arbitration], it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing, serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the [union] in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor *jointly* select a lawyer to handle their presentation (see *Leonard Murphy*, *supra*; *Bedard Girard*, *supra*). . . . An order for separate, independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The respondent [union] is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537) and would have, except for a violation of section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The *exclusive* selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

If indeed the union fails to comply with its duty of fair representation at the arbitration stage, it will expose itself to another complaint before the Board, and the complaint, if proven, will be remedied.

10. Finally, the request for reconsideration asks that "the Board remain seized of this particular matter with respect to the arbitration procedure in order that the Board may intervene should the union not fairly represent Mr. Glykis' interests during the course of arbitration". The Board in its decision found a violation of the Act and fashioned a remedy



to respond to it. If there is a failure to comply with that order, procedures are available to enforce the Board decision. The Board is not prepared to go beyond this, and remain seized, in order to deal with speculative future violations of the Act. As indicated above, if the union fails to represent the complainant at arbitration in accordance with the duty in section 68, it can be the basis for a separate unfair labour practice complaint. It is unnecessary for me to remain seized in anticipation of possible future breaches of the Act.

11. In these circumstances, the Board declines to reconsider, vary or revoke its decision in this matter dated October 31, 1984. The application for reconsideration is dismissed in its entirety.

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**1115-84-R** United Food and Commercial Workers, Local 206, Chartered by United Food and Commercial Workers International Union, Applicant, v. **Keele-Wilson Supermarket Limited**, Respondent, v. Group of Employees, Objectors

**Sale of a Business — Unprofitable chain grocery store closing down — Respondent sub-leasing premises for own grocery business — Some store equipment purchased — Hiatus of six weeks — Location of grocery store important — But no sale on facts found**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

**APPEARANCES:** *D. V. MacDonald and C. McCormick for the applicant; J. Paul Wearing, R. Rosenblatt, Q.C. and Joe Chetti for the respondent; Domenic Reda, Tony Iozzo, Sabrina Iaboni and Roman Gidmondi for the objectors.*

**DECISION OF THE BOARD;** March 6, 1985

# I

1. This is an application under section 63 of the *Labour Relations Act*, which reads, in part, as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the

employer for the purposes of the application as if he were named as the employer in the application.

For ease of reference, the applicant will be referred to as “the union”, the respondent will be referred to as “the company”, and the alleged predecessor, Canada Safeway Limited, will be referred to simply as “Safeway”.

2. This case involves the operation of a grocery business from premises located in a shopping plaza at Finch and Weston Road in the Municipality of Metropolitan Toronto. For some years, there was a Safeway store in that location. By sublease, the company acquired the right to use those premises for its own grocery business. The union contends that the subleasing arrangement and a collateral transfer of certain store equipment, constitutes a “sale” of part of Safeway’s “business” to the company. The union argues that as a result the company “inherits” the Safeway collective agreement. The company’s position is that it has acquired the right to use certain premises owned by a property developer and formerly used by Safeway, but that such acquisition does not constitute a sale of a business within the meaning of section 63 of the *Labour Relations Act*.

3. The hearings in this matter consumed two days and, as it turned out, the facts were not substantially in dispute. The Board heard the evidence of Joseph Chetti, the president of the company, Terry Lyons, a union member who formerly worked in the Safeway store, and Jim Egerton, the former manager of the Safeway store. We prefer the evidence of Mr. Chetti, the company’s president, and Mr. Egerton, over that of Terry Lyons.

4. The company has been in existence since 1971. Joseph Chetti has extensive experience in the grocery business. He worked for a “chain store” as a teenager and, in the early 1970’s, ran a small “family” corner grocery store. In 1977, Mr. Chetti and his brother-in-law concluded that the large chain stores (Loblaws, Dominion, A & P, etc.) were not meeting the needs of the large ethnic population in Metropolitan Toronto. Their range of products was too rigid and too standardized in accordance with North American tastes. In trying to generalize and be “all things to all people”, the chain stores were missing a growing and potentially profitable market — people who might shop at one chain store or another for convenience, but would be prepared to travel some distance to a specialty store providing a more familiar range of goods and services.

5. In October 1977, the company opened its first Tops market at Six Points Plaza in Toronto’s west end, with a view to serving the Italian market. Subsequently, a second location was opened in the Brampton area. Both endeavours were very successful. According to Mr. Chetti (and on this point his evidence was uncontradicted), ethnic customers were indeed prepared to travel some distance to patronize a store catering to their particular tastes. His business met their needs. Local chain stores did not. By the end of 1983, the company began to consider further expansion.

6. The Safeway location at Finch and Weston Road came to the company’s attention through the efforts of a real estate agent with which the company had had previous dealings. The store was in a plaza and had been losing money. Safeway was anxious to leave, and the shopping centre owner was anxious to have the premises occupied by another food store, because a food store attracts customers who would regularly patronize the other commercial operations in the plaza. For his part, Mr. Chetti saw the opportunity to acquire, on favourable terms, a store in a general area with a large ethnic population. He predicted they would respond

favourably to his own marketing concept. He was right. The subleasing arrangement was negotiated in February, 1984. The sublease was executed on March 5, 1984.

7. The Safeway store actually closed on February 25, 1984. In the preceding weeks, notices were posted to advise customers of the impending closing and to identify the nearest Safeway stores. None of the stores is near enough to likely benefit from local walk-in trade. On the other hand, since a family shopper will often use an automobile to carry home the week's groceries, it is difficult to predict how far he will be willing to travel or assess the actual impact of this invitation to shop at other Safeway locations. There is simply no evidence on this point.

8. The "Super Tops" market opened on April 10, 1984. In the six-week period between the closing of the Safeway store and the opening of Super Tops, the company carried out extensive renovations at a cost of about three quarters of a million dollars. The state of the physical premises, services and utilities dictated the general layout of the store's major food areas: meat, dairy, produce, and the "check-out area" at the front. But, consistent with the company's own marketing concept, there was a significant change in emphasis which entailed a substantial expenditure of funds. The company extended the produce cases by 36 feet and purchased 100 feet of meat cases along with a considerable amount of butchers' and meat cutting equipment. The new equipment was necessary because the emphasis would be on self-selection and personalized service rather than prepacked goods. There were new outside signs and canvass canopies to simulate a fruit market atmosphere. The ceiling was replaced and offices were moved to a mezzanine floor. The company purchased a new garbage compactor, new dairy coolers, a new music and security system, and new weigh scales, grinders, and cash registers. As Mr. Egerton described it, the renovations created a much more open concept with free-standing, self-serve displays. There was no doubt in Mr. Egerton's mind that the store had an entirely new look and atmosphere.

9. As part of the transaction to acquire the sublease, the company also acquired certain equipment valued at ninety thousand dollars. Mr. Chetti testified that the company purchased this equipment because it was part of a package deal. It was not a terribly significant factor in the transaction, and some of it might even be useful. As it turned out, much of this equipment was scrapped, traded, or placed in storage in a warehouse.

10. Because the company had been in business for many years, it already had its own established relationships with suppliers, as well as its own warehousing facilities and distribution system for bulk and specialty purchases. Obviously, some of the products formerly carried by Safeway can now be found in the Super Tops store. But there are also real differences. There are literally dozens of lines, brands, and product varieties (many of them imported) which were not found in the Safeway store and which, according to Mr. Chetti, would not be available in other general chain stores.

11. In Mr. Chetti's opinion, he was not in competition with local chain stores. He was in competition with "Gelati Bros.", "Darrigo's", and "Ferlisi Bros." — other well-known stores catering to the ethnic population in the Metropolitan Toronto area. That is why he stocks more than 500 varieties of pastas, numerous kinds and grades of olive oil, fresh poultry, lamb, goats and rabbits (often displayed in European fashion, unskinned or with the heads on to demonstrate freshness). He supplies casings and ingredients for sausages together with appropriate advice on making sausages. He supplies wine containers, grapes and crushers. There is a much larger variety of cheeses than one would expect in a typical chain store. In summary, the presentation, selection, and ultimate sale of food items is quite different from that obtained at Safeway, where,



for example, meat products were regularly sent from a packer or distributor prepackaged so that all the Safeway employees had to do was apply the appropriate prices. On the other hand, there are also a number of products (housewares, health and beauty aids, pet supplies, hardware, etc.) typically carried by Safeway or other chain stores which are not generally sold at Super Tops.

12. Mr. Egerton told the Board that he had recently visited the Super Tops store because he was interested to learn why it had been so much more successful than his Safeway operation. He confirmed the significant cosmetic and structural changes. He said there were significant differences in merchandising concept and means of display. There was much more bulk selling and a wide range of new products. The focus, emphasis and selection were entirely different, particularly in the way that Super Tops sold meat, dairy products and produce. There was little similarity with the Safeway operation where the product range and merchandising were largely determined on a regional basis by "head office".

13. Mr. Egerton confirmed that, in his store, the "Italian section" occupied only about four feet in a regular aisle. This was no different from other Safeway stores. He did not try to appeal to the local Italian market. In the fall of 1983, all 26 stores in his division were having an Italian week to promote the product lines which were ordinarily carried in the store. This was exceptional. Mr. Egerton testified that, ordinarily, there was no particular policy to attract ethnic customers; rather, Safeway tried to appeal to a cross-section of the population.

14. Given the potential market in his area, Mr. Egerton was optimistic that the Italian promotion would be successful. It wasn't, even though it was extended for two or three weeks. It is difficult to resist the conclusion that Mr. Chetti was right: the chain store had neither the will, flexibility, or "know-how" to successfully tap the ethnic market.

15. As we have already noted, the company does *not* appeal to a general market or cross-section of the population. Its advertising is specifically targeted to the ethnic population (Italian, Portuguese, Spanish) within 15 miles of each of its stores. It buys space in ethnic newspapers, advertises on ethnic radio and television stations, and delivers handbills in heavily populated ethnic areas. This approach is obviously successful, for as Mr. Egerton wryly noted, his initial impression of the store and the most obvious change was that the store was busy! Mr. Egerton said that he knew his old customers and that when he visited his old store, the customers were different. Mr. Egerton testified that only about ten per cent of Safeway's customers were of ethnic origin and that most of the Safeway customers were "walk-in trade" from a nearby apartment complex and from the area south of the store. Mr. Chetti testified that, in contrast, 80 to 90 per cent of his customers were of ethnic origin and they were prepared to travel some distance to patronize a business which catered to them. While the evidence is not as clear as it might be, we must conclude that, by and large, the company is able to successfully appeal to a different market than Safeway, and that the apparently higher level of commercial activity observed by Mr. Egerton is based upon that ability. It is a key element in the company's success.

16. That success is graphically illustrated by the immediate and significant increase in customer volume which followed the opening of the Super Tops store. Again, the evidence before the Board is not as complete and reliable as it might be, but it suggests that throughout 1983, the gross sales by Safeway were about \$84,179.00 per week. The average weekly customer count in the last periods of the Safeway store's operation amounted to 6,248 customers per week. By contrast, the respondent company has typically attracted an average of 9,743 customers

per week and had average weekly sales of \$228,571.00. This is a 50% increase in the number of customers and almost a 300% increase in sales volume. The evidence indicates not only that the identity of the customers has changed significantly, but also that there has been a significant increase in their overall numbers and propensity to spend. These figures suggest that whatever it is that makes Super Tops an active and successful going concern is something which Safeway obviously lacked, and which the respondent company was able to immediately bring to bear.

17. The increased volume of the business is reflected in the number and disposition of employees. Safeway employed approximately 13 full-time and 20 part-time staff. When it closed in February, 1984, all staff who wished to do so found jobs in other Safeway operations. Safeway had four meat department employees, working a six-day schedule with extended hours of operation.

18. Super Tops employs approximately 50 full-time and 50 part-time employees: 30 cashiers, 33 clerks, 15 produce employees, and 25 employees in the meat department. For the store opening in April, 1984, 27 key employees were transferred from other locations. About a dozen are still there. In addition, the meat manager, produce manager, store manager and assistant manager all come from the company's own organization. In the case of the meat department, Mr. Chetti emphasized the importance of hiring people with "European" skills and training for which, in his view, there was no adequate Canadian counterpart. The company's other employees were hired through advertisements in the ethnic media. An effort has been made to hire persons with a facility in the language of the company's principal customers.

## II

19. The circumstances of this case are substantially similar to two recent "food store" cases where the Board had occasion to review in some detail the relevant legal principles (see *Queensway Foods Ltd.*, [1984] OLRB Rep. Feb. 358, and *Valencia Foods*, [1984] OLRB Rep. May 773). We see little purpose in repeating that analysis here. It suffices to say that we adopt, as our own, the reasoning in paragraphs 4 and 5 of *Queensway* and 23 to 28 in *Valencia*. We would only point out the ultimate conclusion enunciated in *Valencia*:

The lesson of the cases is that while location and premises are important elements of a retail food business, they are not themselves the business; even location and premises can be or become mere "surplus assets" which alone, or even in combination with other assets, can lack the dynamic or organic quality which distinguishes a business from an idle collection of assets. . . .

That single sentence highlights the issue here: has the company acquired part of Safeway's "business", or has it merely acquired the right to use certain premises, formerly used by Safeway?

20. We do not doubt the importance of location in the retail food industry — particularly since the habit of shopping locally can be an important element of good will and can be the key to business success even if good will is not expressly recognized in the transaction by which the location is acquired. There is no doubt that in this case, there are indications which, when considered in the context of the retail food industry, do tend to point towards a sale of a business within the meaning of section 63. The company continues to carry on a food business from the same location as Safeway which has effectively withdrawn from that local market. The hiatus period between the closing of Safeway and the opening of Super Tops is relatively small (six weeks). The premises and general store layout are similar.

21. But there are also a number of factors which point in the other direction. Mr. Chetti had no intention of acquiring Safeway's business. Indeed, quite the contrary. He already operated two ethnically-oriented supermarkets in Metropolitan Toronto and was anxious to open a third. Safeway's business, as such, was unprofitable and not worth buying.

22. Mr. Chetti learned of the possibility of acquiring the Safeway premises from an independent real estate agent. The company did not acquire any managerial or other expertise from Safeway. The entrepreneurial initiative, managerial talent, and employee skills were all derived from Mr. Chetti's pre-existing operations or were assembled following the sale. A substantial sum was expended so that the new store would conform to Mr. Chetti's business concept rather than that of Safeway. Mr. Chetti knew that his success depended upon expanding, serving and developing his own market which was not being served by Safeway or the other local chain stores. He was able to do this with dramatic success because he was able to bring to bear his own business organization to attract customers whom Safeway never reached. That is why he was able to instantly triple the sales volume. He was not acquiring and reviving an ailing "part" of Safeway's business. He was expanding his own business from premises formerly occupied by Safeway.

23. We accept the union's submission that in the retail food business location is important, and the acquisition of physical premises will in many cases be sufficient to trigger a finding of "successorship"; moreover, when a "severed part" of a business has been transferred it would be an unusual purchaser who did not undertake any new initiatives, or try to put his own imprint upon his recent acquisition. On balance, however, we do not find a sale of a business in the facts of this case. In our view, the presence of Super Tops at Safeway's former location represents the expansion of an already well-established business in which some assets of Safeway came to be used. Those assets did not alone constitute a business or part of a business, and it cannot be said in this case that the company has expanded by purchasing a competitor's business and refurbishing it. It has merely purchased some idle and uneconomic assets which it has used to expand its own successful going concern. Section 63 has no application. This application is accordingly dismissed.

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**3030-84-R** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, Applicant, v. **3-L Filters Limited**, Respondent, v. Sheetmetal Workers' Conference and Sheetmetal Workers' International Association Local 562, Intervener, v. Group of Employees, Objectors

**Membership Evidence — Practice and Procedure — Envelope containing documentary evidence handed over to post office before closing on terminal date — Envelope stamped with next day's date — Time of deposit held to be time mailed**

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

**APPEARANCES:** *Malcolm Boyle, Stan Petronski and Reg White for the applicant; Ian S. Campbell, Les A. Kadar and Werner G. Joch (March 8 only) for the respondent; S. Wahl (March 1 only) for the intervener; T. J. Billo (March 8 only), Rick Tackacs, Charles G. Rose (March 1 only) and Rick Milne (March 8 only) for the objectors.*

**DECISION OF THE BOARD;** March 15, 1985

1. The name of the respondent is amended to read: "3-L Filters Limited".
2. This application for certification initially came before the Board on March 1, 1985 before a differently constituted panel. At the outset of the hearing on that day, counsel for the intervener advised the Board that it was withdrawing its intervention. Counsel stated that the intervener did not wish to obstruct the application by the applicant to represent the employees of the respondent engaged in shop fabrication work and that the interest of the intervener was being pursued in a proceeding under section 124 of the *Labour Relations Act* before the Board against the Electrical Power Systems Construction Association (EPSCA) and Ontario Hydro in relation to the sub-contracting of shop fabrication work allegedly contrary to the collective agreement between the intervener and EPSCA. That panel of the Board then referred this matter to a Labour Relations Officer, but the case was not reached on that day. The application was subsequently rescheduled for hearing and came before this panel of the Board on March 8, 1985.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Before the Board entertained submissions with respect to the description of the appropriate bargaining unit, all parties agreed that the Board should first deal with whether some of the membership evidence filed by the applicant in support of its application was filed on or before the terminal date. After the Board heard the evidence and submissions of the parties on that issue, it recessed to consider the matter and then returned to deliver the following oral ruling:

In this application for certification, Reg White, an assistant business manager of the applicant, attended at Postal Station "E" in Hamilton, Ontario at approximately 5:40 p.m. on February 21, 1985 to mail an envelope (see exhibit #1) containing applications for membership and receipts by registered mail to the Board. February 21, 1985 was the terminal date in this

application. The postal clerk who handled the transaction, Carl George, advised Mr. White that his mail would not be dispatched until the next day and would bear the next day's registration date. Mr. George and Mr. White both testified that Mr. White wanted it registered on February 21. Mr. George accepted the envelope and numbered it when he received it on February 21. Mr. George cancelled the postage stamps and stamped the envelope with a date stamp dated February 22 and also gave Mr. White a registration receipt dated February 22. (See exhibit #2.)

Mr. George explained that Postal Station "E" closes at 5:45 p.m. with the last dispatch of registered mail from that office taking place at 5:30 p.m. He said that postal regulations permit him to accept registered mail after that time of day because the mail can be secured in the Post Office vault provided he advises the customer that it will be dispatched and dated the next day. Mr. George also explained that a number is placed on a registered mail envelope so that it can be traced.

Counsel for the applicant submits that the membership documents were mailed by registered mail on February 21, 1985. Counsel for the respondent and counsel for the objecting employees submit that the membership documents were not mailed until February 22 because that was the date that the envelope containing those documents was dated, processed, and dispatched by the Post Office.

All counsel agree that section 75(1)(b) of the Board's Rules of Procedure govern this matter. That section states:

Where a document is required to be filed by these Rules, filing shall be deemed to be made,

• • •

- (b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario M7A 1V4, *at the time it is mailed.*

[emphasis added]

The Board in this case must determine the time the envelope containing the membership documents was mailed by registered mail. It is clear to us that the envelope containing the membership documents was deposited with the Post Office on February 21. It was numbered at the Post Office, the cancellation stamp with the next day's date was applied to it, and it was placed in the Post Office vault on February 21. There is no doubt that the Post Office had exclusive custody of the envelope and that the postal clerk had numbered the envelope so that it would appear on the list of registered mail after it was received from Mr. White on February 21. The registered mail list was dated February 22, but the entry relating to Mr. White's envelope was made to that list on February 21.

In our opinion, the depositing of the envelope with the postal clerk who stamped and numbered it and entered it on the registered mail list, constitutes mailing by registered mail within the meaning of the Board's Rules of Procedure. Since that happened on February 21, 1985, we find that the membership documents were mailed by registered mail to the Board on February 21, notwithstanding that the envelope and receipt were dated February 22, 1985.

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*[Balance of decision omitted]*

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**2715-84-R** Doris Wilson et al, Applicant, v. Technical, Office and Professional Employees Local Union 173-1, Respondent, v. **Labatt's Ontario Breweries**, Intervener, v. Group of Employees, Objectors

**Petition — Termination — Lawyer drafting petition and having possession for period of time not testifying — Not reason to reject petition — Social relationship between applicant and plant manager by itself not tainting voluntariness of petition**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members J. Wilson and L. Lenkinski.

**APPEARANCES:** *S. J. Kay for the applicant; E. G. Posen, Joe Karai and Jim Walker for the respondent and objectors; Martin Addario and Susan Laberee for the intervener.*

**DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON;** March 18, 1985

1. This is an application brought pursuant to section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union with respect to a unit of office and clerical employees, nurses and nursing assistants employed by the intervener employer at its premises in Waterloo, Ontario. The application satisfies the timeliness requirements of subsection (2) of section 57. Subsection (3) of that section reads as follows:

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

The intervener employer filed a list indicating that there were thirteen employees in the



bargaining unit as of the application date. One of those was not at work on the application date, however, and did not work at any time in the thirty day periods before and after the application date. In accordance with the Board's usual practice, the parties agreed that that person would not be considered an employee for the purpose of the count contemplated by subsection (3) of section 57. The respondent trade union challenged the inclusion in the bargaining unit of two other persons: Anna Kempkes and Louise Russell. The parties agreed that Kempkes had been a full-time employee until June, 1984, when her job was eliminated. She was told at that time that the employer would call her in for relief work when such work was available. Such work was, in fact, available, and Ms. Kempkes worked on a total of sixteen days from the beginning of June to the end of November. She was at work on December 14, 1984 and on January 11, 1985, but not on the date of this application. Ms. Russell was also employed as vacation and illness relief. Prior to December, 1984, she had worked a total of 23-1/2 days. From December, 1984, to the date of the hearing, February 15, 1985, she had been at work every day, filling in for the intervener's receptionist, who was receiving training for word processing and accounts payable duties. Ms. Russell was expected to continue as a replacement for the receptionist until sometime in March, when her employment would return to the pattern which existed prior to December 10, 1984.

2. The applicant filed with this application a document ("the petition") purporting to evidence the desire of six employees in the bargaining unit that they no longer wish to be represented by the respondent. The respondent has filed a document ("the counter-petition") signed by five persons and purporting to evidence their desire that they continue to be represented by the respondent in their relations with the intervener. None of the signatures on the counter-petition corresponds with any of the signatures on the petition. It is not necessary at this point to deal with the respondent's challenges to the employer's list, since the Board is satisfied that in any event of the outcome of those challenges, the written significations filed by the applicant are sufficient in number to cause the Board to order a representation vote if those people are found to have voluntarily signed the petition. In that connection, we heard evidence as to the circumstances concerning the origination of the petition and the manner in which each of the signatures on it was obtained.

3. The applicant, Doris Wilson has been employed in the accounting office at the intervener's Waterloo plant for the last twenty-four years. The intervener purchased that plant from Carling O'Keefe about seven years ago. Ms. Wilson's recollection is that the respondent union became the bargaining agent for the office, clerical and nursing employees about fifteen years ago, when Carling O'Keefe was their employer. She has never been actively involved in union activities. During the past fourteen years she has been a director, general manager and treasurer of a small employees' credit union which operates rent-free in premises on the property now owned by Labatt's. Membership in the credit union is open to all employees, whether or not they would be regarded as "managerial" for the purposes of the *Labour Relations Act*. Ms. Wilson gave up her position with the credit union at some time after October, 1984.

4. Ms. Wilson said her personal dissatisfaction with the trade union had existed for some time, and that she had even gone so far as to call the Labour Relations Board four years ago to inquire about the decertification. She did not proceed at that time, she says, because although she felt she had support among the women in the office, she did not feel there was sufficient support among the men. That changed in May, 1984, when the positions of two office employees were eliminated and they were forced to take early retirement. Ms. Wilson says she became quite concerned when she learned of the level of pension benefit these employees received. It

was considerably less than she thought they would get. She worried about the level of her own pension benefits. She spoke, she says, to office workers at Labatt's unorganized offices in London and Toronto, who told her what benefits they were receiving. She regarded those benefits as superior. She became resentful of the union's having failed to secure adequate pension benefits in the last negotiations with the intervener, the more so because the union had concentrated, she thought, on getting maternity benefits which could be of no use to the vast majority of the employees in the unit. The level of pension benefits and the value of the union to the employees in the unit became a topic of conversation with and among other employees in the unit. In October, 1984, Ms. Wilson called the Board to find out what had to be done in order to apply for termination of the respondent's bargaining rights. She says she was told about the time frame in which the application had to be made, and understood from what she was told that an application had to be filed *before* the commencement of the last two months of the term of the collective agreement. There were only a few days left within which to meet that particular deadline. She turned, for assistance, to her solicitor, Mr. Kay. She had known Mr. Kay for about six years, during which time he had acted for her in connection with personal matters, and had also acted on occasion for the credit union while she was its general manager. Mr. Kay drew up a petition in substantially the same form as the one filed with this application. Ms. Wilson spoke to various of the employees who she believed would support a petition, and asked them to come to the credit union offices during their lunch hour one day near the end of October. Mr. Kay was at the credit union offices with the petition and he read it out to the employees who attended at the credit union office, and invited them to sign it only if they wished to do so. No member of management was present. After it was signed by those who wished to sign it, that petition was submitted to the Board along with Ms. Wilson's first application.

5. In mid-December, 1984, Ms. Wilson learned that her first application would not be entertained because it had been filed too early. She was leaving on a winter vacation in a matter of days. She spoke again to Mr. Kay, and asked that he prepare another petition and application. She also spoke to a co-worker, Brian Heimpel. Mr. Heimpel had been a supporter of the first petition. Ms. Wilson asked him if he would circulate the second petition for her while she was away. He said he would. Ms. Wilson went to Mr. Kay's office to sign the petition shortly before she left on vacation. On December 21st, Mr. Heimpel took a long lunch hour, something he had the authority to do without seeking prior permission of management. He drove to Mr. Kay's office, which is one or two miles away from the office, signed the petition himself, and brought it back with him to the office. The other four signatories to the petition were in their respective offices and were still on their lunch hour. Mr. Heimpel approached each individually and, in the absence of anyone other than Heimpel, each signed the document. Heimpel knew who would sign from the positions that had been taken earlier. Accordingly, there was no one he approached who refused to sign. Having obtained those four signatures, he put the petition in his desk, out of sight. After work, he returned the petition to Mr. Kay's office. That was the last Mr. Heimpel saw of it until it was shown to him in the course of the hearing. It arrived at this Board on December 28, 1984, together with the application before us, in a business envelope bearing Mr. Kay's name and address.

6. In its Reply, the respondent alleges:

that the petition was circulated among employees in the bargaining unit by Doris Wilson being the alter ego of Mr. Harvey Hurlbut, Plant Manager of the Employer and that the said Doris Wilson and the said Harvey Hurlbut together connived at and conspired in the preparation, circulation and execution of the said petition.

Harvey Hurlburt is the plant manager of the intervener's Waterloo plant. Ms. Wilson has been seeing Mr. Hurlbut socially since August 1983, several months after the death of her husband of fourteen years. Indeed, Mr. Hurlbut has travelled with Ms. Wilson on trips to visit her relatives in Florida. The vacation on which she left December 19, 1984 was taken with Mr. Hurlbut. Earlier that month, they had sat together at dinner at the employee Christmas party, at a table occupied by members of management.

7. Ms. Wilson vigorously and categorically denied having any conversation with Mr. Hurlbut which any in way related to this or the previous application for termination of the respondent's bargaining rights. She denied even discussing with him the level of her pension benefits or of the benefits she might receive under the Labatts plan for "salaried" — that is, unorganized — office employees. She said Mr. Hurlbut would not discuss any of these things with her. When pressed in cross-examination, she admitted Mr. Hurlbut had commented on seeing her name on the bulletin board when the Board's notices were posted. We do not propose to review here the several other contradictions and inconsistencies to which she was driven during vigorous cross-examination by counsel for the respondent. We note that the answers she gave during that examination, as well as during the Board's examination and examination by her own counsel, were often unresponsive to the questions asked, and this was so whether the question were plainly innocent ones or obviously challenging ones.

8. Mr. Heimpel was a frank and forthright witness. He has worked for Labatt's since it purchased the Waterloo plant, and he worked for Carling O'Keefe at that same plant for a number of years prior to that purchase. He was the first president of the respondent local trade union when it was organized. He testified that the union was organized during the tenure of a Carling O'Keefe president who encouraged the practice of collective bargaining. Heimpel said the interest of bargaining unit employees in the locals' affairs had wained in recent years. He personally had come to the view that there was no longer any need for representation by this local. He also felt the early retirement of bargaining unit members in May, 1984, had triggered a general awareness of the level of pension benefits provided under the contract negotiated by the respondent. He said the employees had "kicked around" the question whether they should continue with the union from time to time. He seemed to think the early retirements in May or June had triggered the discussions which culminated, in October, in the first petition circulated by Ms. Wilson. He corroborated the evidence of Ms. Wilson with respect to the manner in which signatures were obtained on that first petition. He also corroborated Ms. Wilson's testimony with respect to the circumstances in which he had become involved in the circulation of the second petition. He testified that one other of the signatories to the petition is a former president of the respondent local.

9. The respondent trade union argues that the Board should refuse to act on the petition filed by the applicant for two reasons. The first has to do with the completeness of the evidence presented by the applicant. That evidence establishes that Mr. Kay, a lawyer retained by the applicant, was responsible for drafting the petition, that the petition remained in Mr. Kay's possession between the time the applicant signed it and the time Mr. Heimpel picked it up and that it was again in Mr. Kay's possession between the time Mr. Heimpel returned it to him and the time it was delivered to the Board in an envelope bearing Mr. Kay's name and address. The respondent trade union takes the position that the failure to call Mr. Kay to testify about the handling of the petition while it was in his possession must be fatal, and cites for that proposition *Vered & Harvey Company Limited*, [1971] OLRB Rep. Nov. 736.



10. *Vered & Harvey Company Limited* involved a certification application in which certain employees had filed a petition opposing the certification of the applicant. Witnesses were called to testify with respect to the origination of the petition and the manner in which the signatures on it were obtained. One of the witnesses testified that he had retained a lawyer, that the lawyer had prepared the petition, and that he and four other signatories had signed the petition in the lawyer's office. Another witness testified that he, too, had signed the petition in the lawyer's office. A third witness, however, testified that he had found the petition on a table at his place of work, and had signed the petition there. From that testimony, and from the relative position of that witness's signature on the petition, the Board concluded that the petition must have travelled from the lawyer's office to the employees' place of work and back to the lawyer's office again by means and in circumstances not revealed by the evidence. It was in those circumstances that the Board refused to give weight to the petition. It is quite apparent that what troubled the Board was, to use its words, the "hiatus in the evidence with respect to the question as to how the document was taken from the lawyer's office to the hotel and back again" as well as the "lack of evidence as to who it was that left the petition on the bar counter where Sheffield found and signed it, and who later removed it." There is no suggestion that the Board had any concern about the custody of the petition while it remained in the possession of the petitioner's lawyer. In the case before us, there is no suggestion that Mr. Kay was acting on behalf of anyone other than Ms. Wilson, or that Mr. Kay in any way deviated from the instructions, express and implied, which he received from his client. In the absence of any challenge to the propriety of Mr. Kay's conduct or of any suggestion that something untoward occurred while the petition was in his office, we reject the contention that the applicant was obliged to call her lawyer as a witness or that the failure to do so prevents our treating it as a voluntary expression of the wishes of the employees who signed it.

11. The second ground advanced by the respondent for rejecting the petition rests on the relationship between the applicant, Ms. Wilson and the intervener's plant manager, Mr. Hurlbut. The respondent submits, and we are satisfied on the evidence, that Ms. Wilson's social relationship with Mr. Hurlbut would generally be known to the employees in the bargaining unit. On the basis of that, the respondent invites us to conclude that employees approached to sign the petition now before us would think that Mr. Hurlbut was behind it or, at least, believe that Mr. Hurlbut would learn whether or not they signed. The respondent cites *Canparts Automotive International Limited*, an unreported decision dated May 26, 1983, in Board File No. 2755-82-R for the proposition that a petitioner's friendship with a member of management can and should be fatal in the determination of the voluntariness of the petition.

12. The petition under consideration in *Canparts Automotive International Limited*, was a petition filed in opposition to a certification application. The context in which the petition originated and circulated included two meetings called by management at a time when management would have been aware of the trade union's organizing campaign. The Board accepted evidence that members of management present at those meetings had suggested that there was no need for an outside influence, that it would be a good idea if the employees organized themselves, and that the employee proponent of self-organization should discuss the idea with other employees and "get back to him" — i.e., to the member of management — about it. The Board also found that management had offered the employees the opportunity to "vote for" one of two dental plans, and that dental plans had not been the subject of discussion before the trade union's organizing campaign had begun. The person that circulated the petition had some disciplinary responsibility and was a close friend of both the plant superintendent's daughter and one of the "charge hands" whose functions bordered on the sort of managerial functions contemplated by section 1(3)(b). The employees' knowledge of these relationships

was just one of the several factors the Board took into account in assessing whether to give any weight to the petition in exercising its discretion under section 7(2) to certify either with or without a vote. In all the circumstances, the majority concluded that the petition was not a sufficiently reliable indication of a voluntary change of heart by those of the signatories who had earlier signed applications for membership as to lead the Board to direct a representation vote when the membership evidence submitted by the applicant was sufficient to support certification (or, in that case, interim certification) without a vote. It is apparent from the decision that the overt behaviour of management played a significant role in that conclusion.

13. A petitioner's personal relationship with a member of management is a factor to be considered in assessing what would have been in the minds of those who signed the petition. The existence of such a relationship, however, does not lead inexorably to the conclusion that the petition does not reflect the voluntary expression of the wishes of those who signed. *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690 involved an application for termination brought by an employee who was the wife of one of the co-owners of the tavern at which she and the other affected employees were employed. The Board found that the petition was voluntary. In *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877, the Board found that a petition in support of a termination application was voluntary, even though the applicant was the sister of the immediate supervisor of the employees affected. A petition circulated by the son of the owner of the employer company was rejected in *Jean Marc Joannis*, [1983] OLRB Rep. Jan. 92, when the Board concluded that the son would be regarded by employees as an arm or agent of his father and, hence, a member of management. It was not without significance in that case that the owner's son, applicant on the application, had served as manager of the store when his father was absent and, it was found, had made references to his father's ownership and management of the business in the course of circulating the petition.

14. Although Ms. Wilson's relationship with Mr. Hurlbut was a matter of general knowledge, there is no suggestion that she or Mr. Heimpel traded on that relationship or emphasized it in any way in the circulation of the petition. There is no evidence of any behaviour by any member of management which might have improperly influenced employees' wishes with respect to representation by this trade union. This is not a case in which the relevant signatures reflect an abrupt reversal of a recent commitment of the trade union, as is necessarily the case when the petition is filed in response to a certification application. Mr. Heimpel testified that the vast majority of the employees in the unit have been with the company, and hence the union, for a number of years. The inferences one might draw in this context about employee perceptions and management involvement might well be different from those which one might draw in the context of a certification application. As the Board noted in *N-J Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

15. Our colleague refers to the Board's oral decision in *Patro d'Ottawa* reported at [1984] OLRB Rep. May 741. Le Patro was a social service agency in Ottawa operated by the religious order of St. Vincent de Paul. Its executive officers were appointed by the Order, and were all members of the Order themselves. They all lived together in a house adjacent to Le Patro. In February, 1982, CUPE applied for certification for a unit of the agency's employees. Although CUPE was certified in April, 1982, and was later successful on a complaint that Le Patro had violated the freeze provisions of the Act (see *Le Patro d'Ottawa*, [1983] OLRB Feb. 244), it was unable to negotiate a collective agreement with the Order. The "leader and spearhead" of termination application under consideration in the second *Le Patro d'Ottawa* case was a member of the Order, a Mr. Delwaide, who had been a member of management from September, 1982 to June, 1983 and was the only member of the Order employed in the bargaining unit. The first of the steps which culminated in the petition was a meeting at Delwaide's home — the home where the entire management compliment of the employer resided. Thereafter, Delwaide "moderated" a meeting of employees on the premises of Le Patro, and made his views clearly known. He abstained from participating in a straw vote conducted before the petition was circulated among meeting participants because he did not want to be perceived as having "influenced" the expression of the other employees. The Board found that this demonstrated Delwaide's own sensitivity to his unique position. At paragraphs 8 and 9 the Board held:

... In our view the point at which Mr. Delwaide withdrew himself was artificial and too late to undo the damage which all of his participation had done to that point: the straw vote taken amongst the employees at that time cannot be taken as reliably indicating the sentiments of employees, particularly since Mr. Delwaide remained in the room for the vote itself and participated in the counting. When it came time to circulate the actual petition, Mr. Delwaide was present for the solicitation of many of the signatures, but in any event his role was well known by that time. No matter how much at ease Mr. Delwaide may have himself felt in discussing this matter with other employees, the Board has no reasonable assurance that other employees would view Mr. Delwaide, who was, after all, a "religieux", an individual who lived and ate every day with all the officers of Le Patro, and who had in fact been a member of management a short time before, with the same ease when expressing themselves on an issue as important to management. The three of us have no doubt that Mr. Delwaide was sincerely motivated by his own views, but a recognition of the freedoms of expression and association of others required that he restrain and withdraw himself from the process of taking action with respect to the union — in the way that he did on the final vote which was taken, but at a much, much earlier stage.

On the undisputed facts we have no alternative but to find that the involvement of Mr. Delwaide in the petition before us critically undermined its probative value and we can make no finding of voluntariness based upon it. That is the only issue before us in this termination application and we must not be taken as making any finding or comment upon the reasons put forward for supporting or not supporting the union, nor on any difficulties in bargaining with which this application does not deal. The application itself must be dismissed and we hereby do so.

In our view, and with the greatest respect to our colleague's contrary view, there can be few points of comparison between the circumstances of this and the *Le Patro* cases. Here collective bargaining has gone on for many years, and has resulted in more than one collective agreement. That results in a context and climate quite different from that in *Le Patro*. Ms. Wilson has never been a member of management. Her current social relationship with a senior manager cannot be compared with the religious commitment Delwaide shared with all members of management in *Le Patro*. While we agree with our colleague that Ms. Wilson's social relationship cannot be overlooked, we cannot agree that the grounds or facts in *Le Patro* are similar



to those here. The outcome in each case depends on its particular facts, and the relative weight to be assigned, on those facts, to the considerations outlined in the Board's jurisprudence.

16. Here there is uncontradicted evidence that the desirability of continued representation by the respondent had been the subject of questions and discussion from time to time over a period which antedates the applicant's relationship with Mr. Hurlbut. Counsel for the respondent noted that such discussions had not borne fruit until that relationship was established, and we have considered what inference may be drawn from that observation. In all the circumstances, we are not prepared in this case to draw the inference that Mr. Hurlbut promoted the petition, nor can we conclude that employees asked to sign the petition would believe that Mr. Hurlbut had promoted it. Mr. Hurlbut and Ms. Wilson are not adolescents, nor are the employees who were asked to sign the petition. We do not suppose, and do not believe the employees would have supposed, that the existence of a social relationship between Mr. Hurlbut and Ms. Wilson would undermine the independence of judgement or action of either of them. We have considered the possibility of employee perception that Hurlbut would become aware of their decision whether or not to sign the petition. We had difficulty believing Ms. Wilson's evidence that neither the existence of petition nor even the concern for pension rights that led to it would even have been mentioned in her conversations with Mr. Hurlbut, and we think it would not have been difficult for employees to imagine that these matters might have been the subject of some discussion between them. We think it would have been much more difficult for them to imagine (and, therefore, unlikely they did imagine) that Ms. Wilson would go into the detail of who did or did not sign, and so betray the confidence of people with whom she had had a working relationship for much longer than either Mr. Hurlbut's comparatively short tenure at that plant or his social relationship with her.

17. In all the circumstances, we are satisfied that knowledge of Ms. Wilson's relationship with Mr. Hurlbut would not have so influenced the employees in this bargaining unit as to deprive their execution of the petition of its significance as a voluntary expression of the wishes of those employees.

18. Before turning to the consequences of that finding, we feel we should comment on the participation in this hearing of counsel for the intervener employer. After the evidence was in and the argument of the applicant and intervener had been made, counsel for the respondent trade union for the first time raised a concern about the approach taken by counsel for the intervener in his questioning of witnesses and in his submissions to the Board. Counsel for the respondent said he was surprised that the employer's counsel would take such an active role in what was essentially a contest between the union and certain objecting employees. He said he could understand the employer's taking that position if it was to protect Mr. Hurlbut, but submitted that there had been no allegation against Mr. Hurlbut that would justify active involvement by employer counsel. We found nothing improper in the extent and nature of participation by the employer's counsel in this hearing. The respondent's reply alleged that Harvey Hurlbut had "connived at and conspired in the preparation, circulation and execution" of the petition. That was a serious allegation of interference in trade union matters by a senior member of management. Although the respondent trade union was not seeking a remedy for that alleged unfair labour practice in these proceedings, it came as no surprise to us that counsel for the intervener would adopt the position that there had been no management interference, and would question witnesses and make submissions in such a way as to promote that position, and we find nothing improper in his doing so in response to the position taken by the respondent in its Reply.

19. In the result, we are satisfied that not less than forty-five per cent of the employees of the employees of Labatt's Ontario Breweries in the bargaining unit represented by the respondent at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union as of January 17, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

20. We direct that a representation vote be taken among the employees in the bargaining unit represented by the respondent, as described in its most recent agreement with the intervenor, namely:

All employees in the Bargaining Unit employed by the Company at its premises in Waterloo, Ontario, being all office and clerical employees, nurses, and nursing assistants, save and except salesmen, foremen, supervisors, persons above the rank of foreman or supervisor, office manager, sales administrator, confidential secretary to the Plant Manager, confidential secretary to the Personnel Manager, laboratory technicians, students employed during the school vacation period and persons covered by subsisting collective agreements.

21. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Labatt's Ontario Breweries.

22. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER L. LENKINSKI;**

1. Regretfully I cannot agree with the decision of the majority of the Board in this matter.

2. In the unanimous decision of the OLRB case of *The Employees of Patro d'Ottawa (Patro Ottawa) v. Canadian Union of Public Employees*, 2641-83-R of May 11, 1984, the Board dismissed the termination application on very similar grounds to the instant case.

3. The applicant Doris Wilson carried on a social relationship with the manager of the enterprise. Such a relationship cannot be overlooked in these circumstances.

4. I would have therefore concluded that the petition is tainted and would have dismissed this application.

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**0141-84-R** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Lumonics Inc.**, Respondent, v. Group of Employees, Objectors

**Bargaining Unit — Employee — Whether lead-hands exercising managerial functions — Whether employees in Product Development, Research and Marketing departments having community of interest with production employees — Community of interest issue between production and technical employees in high tech industry discussed**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members A. Grant and H. Kobryn.

**APPEARANCES:** *Ken Petryshen and Mark Middleton for the applicant; Russel Zinn, Frank Mulock, Bernie Sloan and Brian Creber for the respondent; Jacques A. Emond and Marilyn Bennett for the objectors.*

**DECISION OF THE BOARD;** March 21, 1985

1. This is an application for certification. The applicant and the respondent have partially agreed to a description of the appropriate unit for certification. They have agreed to the following partial description:

all employees of the respondent in the City of Kanata, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a university of college co-operative programme.

The partial description of the bargaining unit would include the following employees in the listed occupational classifications of the Production Department:

Production Technician (8)  
Electronic Assembler (11)  
Electronic Assembler/A.C. Inspector (1)  
Assistant Supervisor/Q.C. Inspector (1)  
Shipper (1)  
Assist. Supervisor/Test Lab (1)  
Test Technician (7)  
Incoming Inspector (1)  
Receiver (1)  
Tester (2)  
Stockroom Clerk (2)

2. The position of the respondent is that there is a community of interest with the employees in the Production Department and the employees in the Product Development, Research, and Marketing-Industrial Products departments. Therefore the respondent seeks to have these employees included in the bargaining unit. However, the applicant seeks to exclude those employees. These disputed positions are:



### PRODUCT DEVELOPMENT

R. Gravel-Electronic Design Engineering Technician  
 H. Kwok-Electronic Design Engineering Technician  
 T. Kovats — Electronic Design Engineering Technician  
 J. Wills — Electronic Technologist  
 G. Malcove — Prototype Technician  
 D. Scribailo — Calibration & Maintenance Technician  
 K. Eap-Engineering Technician  
 P. Wakeman-Design/Draftsman  
 D. McNaughton-Design/Draftsman  
 D. Corneil — Drafting Staff  
 K. Newton — Drafting Staff  
 C. Baldry — Drafting Staff  
 N. Geick-Machinist  
 D. Vance-Machinist  
 B. Bullen-Senior Designer  
 B. Bowen — Senior Designer  
 A. Statham-Product Co-Ordinator  
 S. Fendrykowski — Technologist  
 C. Becker — Technologist  
 A. Aucoin — Technician

### RESEARCH

S. Campeau — Technologist  
 S. Hastie — Technologist  
 J. Montgomery — Staff Scientist  
 G. Boyd — Technologist  
 D. Raynes — Technologist  
 G. Furlong — Technician

### MARKETING-INDUSTRIAL PRODUCTS

R. Hughes — Lasermark Product Specialist  
 L. Stamas — Lasermark Technician

3. In addition, the applicant challenged the list of employees submitted by the respondent with regard to Merrick Bentley who is the lead hand in Standard Products and Ron Campbell who is the lead hand in Special Products, arguing that they perform managerial functions within the meaning of section 1(3)(b) of the Act. While the applicant had initially also challenged the inclusion of the Production/Material Controller, the Material Controller and Spares Co-ordinator, and the Junior Material Controller as being managerial and/or having no community of interest with the bargaining unit applied for, counsel for the applicant indicated at the outset of the hearing that he was prepared to concede that these people should be included in the unit.

4. A statement of desire signed by twelve persons employed by the respondent also expressed an opposition to this application. Because of the extent of differences between the parties regarding the appropriateness of the bargaining unit and the composition of the list

of employees, the Board appointed a Labour Relations Officer to enquire into and report to the Board on the duties and responsibilities of the persons in dispute by a decision issued on May 9, 1984. The evidence upon which this Board relies is contained in a Labour Relations Officer's report dated November 23, 1984.

5. The report contains the examination of twelve witnesses, includes eight exhibits and is over 400 pages in length.

A. The Managerial Issue — Section 1(3)(b) of  
the Act

6. The respondent and the objectors assert that the bargaining unit applied for by the applicant is inappropriate because it would not include two lead hands, namely Mr. Campbell and Mr. Bentley. The applicant union argues that the lead hands perform managerial functions within the scope of section 1(3)(b) of the Act and so ought to be excluded from the unit. Section 1(3)(b) provides:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

7. The Act does not define managerial functions, but several panels of this Board have dealt with the issue in related and similar contexts. Two "benchmark" situations have emerged as the guidelines for analysis. Where there is a "direct influence" on the employment relationship, the Board looks to "effective control" or authority over other persons as the criterion (*Chrysler Canada Ltd.*, [1976] OLRB Rep. Aug. 396). Where there is an "indirect exercise of job responsibilities that influences the employment relationship of others", the Board will look to independent decision making as the criterion for recognizing people as management (*Inglis Ltd.*, [1976] OLRB Rep. June 270). But obviously, each case and each situation must be analyzed carefully on its own facts.

8. The reason why people exercising managerial functions must be excluded from the bargaining unit is that we cannot allow workers to be placed in a position of a conflict of interest. This concept was articulated in *The Corporation of the District of Burnaby*, (1974) Can. LRB at page 3:

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those

with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

9. Because of the policy of avoiding a situation of having employees with divided loyalties, the Board has also distinguished between employees who have "input" into the working lives of other employees and those who have "impact" upon others. Such an analysis was done in *Hydro Electric Commission of the Borough of Scarborough*, [1981] OLRB Rep. Jan. 38:

26. To determine whether the foremen in this case exercise managerial functions within the meaning of section 1(3)(b) of the Act, the Board will look to whether or not they exercise effective control and authority over the people they supervise as may be seen by an ability, at a minimum, to make effective recommendations in areas that materially affect the economic lives of the employees. If they act merely as conduits for management and do not themselves effectively control the economic lives of their employees, they would not be exercising functions with true managerial significance. As well, foremen would not be exercising managerial functions if they merely gather facts relating to their men from which management is then able to make its own decisions as to how to deal with particular situations. Even if foremen's evaluations of employees are given serious consideration and are relied on by their supervisors in making their decisions affecting employees, the foremen would not be making effective recommendations unless the recommendations are so consistently and frequently followed that it could be said that through the recommendations the foremen are effectively controlling or determining the decisions. A recommendation would not be effective, for example, if it was merely one of several factors considered or relied on by a supervisor in the course of making his own independent decision. Similarly, foremen would not be viewed by the Board as exercising managerial functions if they merely act within strict supervisory guidelines set by others.

27. Areas of fundamental importance to the economic lives of employees and thus areas that would assist the Board in deciding whether a foreman has effective control and authority over people he supervises would include, among others, the foremen's participation in the hiring, discharging and disciplining of employees, his input into their general performance evaluation, participation in the grievance procedure and, to a lesser extent, the foreman's ability to give time off and assign overtime.

10. Keeping these principles in mind, we can now turn to the facts and circumstances of the case at hand. Mr. Bentley is the lead hand in the Standard Products Division of the Production Department of the company. In general terms, his division builds the sub-assemblies that go into the Laser Mark system and then does the assembly of the final products. He has five men classed as production technicians working under him. Mr. Campbell is the lead hand in the Special Products Division of the Production Department. Basically his Division is responsible for the work done on "initial builds" or prototypes. He has three men classed as production technicians working under him. For all intents and purposes, the responsibilities of Messrs. Campbell and Bentley are the same with regard to the issue of whether they are managerial or not, so their positions can be discussed together.

11. Both Mr. Campbell and Mr. Bentley spend a good portion of their time involved in "hands-on" work in their departments in addition to any administrative or supervisory work which they may have to do. In addition to this hands-on work, they are responsible for assigning the work to their technicians on a daily basis. They make the assignments based on the requirements of the production schedule that is given to them by the Director of Production, Mr. Creber. Mr. Bentley says that he makes a daily assignment on the basis of his technicians'



capabilities, but admits that he is "governed by the schedule." Both men consider themselves responsible for the quality of the work done in their departments and they can order work to be redone if it is not satisfactory. The Director of Production considers the lead hands as "the centre of quality control." Both men are also the ones who would train new employees in their divisions.

12. Messrs. Campbell and Bentley are responsible for the preparing of reports for the employees' annual assessments. Those reports deal with the employee's workmanship, attendance and performance for the past year. The reports are given orally or in writing to the Director of Production, Mr. Creber. The reports are then channelled through the Director of Personnel and to the Vice-President. An employee's yearly increase is determined on the basis of the report. While the lead hands do not directly recommend or decide if the increase is to be granted, the decision to award the increase is made after a review of the report on the recommendation of the Director of Production. Once the report is finalized and the salary increase is determined, the lead hands annually meet with the technicians under them to review the report and any aspects of their employment for the past year. The lead hands also lay out the company's position with regard to the salary increase. If the technician challenges the decision about his salary increase, the report is taken back by the lead hand to the Director of Production where it is reviewed further by the Personnel Department. At this stage, the lead hand will forward the employee's point of view regarding the increase to the company. Once the issue has been reconsidered, the lead hand meets again with the technician to go over the report.

13. A great deal of evidence was introduced about the lead hands' involvement with hiring of new men into their department. It is clear that both lead hands are expected to train newcomers. It is equal clear the lead hands have not been involved directly or indirectly with the decisions as to how many technicians would be placed in each department. Finally, it is clear that the new employees in these departments are interviewed by three persons before they are hired. They are interviewed by the lead hand, the Director of Production and the Director of Personnel. Mr. Bentley feels that no employee that he did not want would be placed in his department. Mr. Campbell considers himself as "one of the men in the hiring process." Mr. Creber claims that he and the Director of Personnel are the ones who actually decide who to be hired and that the lead hands are "sometimes" surprised by the choices imposed upon them and cited some examples. But the Director of Personnel's views were different. He described the hiring process to be one of "consensus . . . in the final analysis." He said that when all three agree on one person, the person agreed upon usually gets hired and there is no "dominant opinion." Further, if anyone disagrees, "the disagreement carries the day."

14. The evidence also dealt the lead hands' involvement in discipline. Neither Mr. Campbell nor Mr. Bentley say that they have ever been involved in any grievances. But it must be noted that there is no evidence of any grievance procedure in force. Mr. Bentley described that he has recommended termination of employees and a disciplinary transfer. He also recommends whether a probationary employee is kept on or not. Further, he has given disciplinary warnings to an employee. Mr. Campbell said that he has reprimanded an employee "in conference" with Mr. Creber, but has never recommended more than a reprimand. Further, Mr. Campbell recommended a transfer of an employee who was not working out in his department. He admits that it took over a year after he first complained for the transfer to be ordered. He further recognizes that he cannot terminate an employee on his own initiative. Mr. Sloan explained that the firing and the discipline is done by a "committee approach." He said that it cannot be done unilaterally by a lead hand, a supervisor or even a department

manager. Again, he said that "equal importance is given to each opinion" in an effort to reach a "consensus."

15. The lead hands are also involved in the recording and determination of hours worked. The company does not use a punch card system of time-keeping. Instead, the company relies on the "honour system" of having employees fill in their own time cards. The primary purpose of the cards is to record hours allocated to each project during the week. The lead hand checks and signs the technicians' time cards each week. The lead hand's signature is necessary for payroll to process the weekly wages.

16. Time off is approved by the lead hands to a limited extent. The company does not pay overtime but has a system called the "plus/minus system" whereby employees can bank overtime hours worked and then take a corresponding number of hours off for their own purposes. While the respondent's witnesses suggested that employees could take time off for up to 16 hours before there would be any concern over the amount of time in the bank, it is clear that both lead hands have let the number of "minus hours" accumulate significantly beyond the 16 hours. But each lead hand has a figure beyond which he felt that he should consult Mr. Creber before granting additional time off. If an employee is going to be late or sick, he or she will call in to the lead hand and advise him. It is up to the lead hand to keep track of the employees' plus and minus records.

17. With regard to overtime itself, the lead hands or the Director of Production can decide if overtime is necessary. But it is the lead hand who decides who he wants to perform the overtime and he will offer that chance to his choice of employee.

18. The lead hands also have responsibility for attending weekly production meetings. These meetings are chaired by the Director of Production. They are attended by the two lead hands, the supervisors and controllers of the Production Department. Everyone else who attends the meeting is considered managerial by the parties in these proceedings. These meetings deal with production, schedules and working conditions.

19. Both lead hands explain that they feel able to resolve problems of workmanship, quality and quantity of work directly with the technicians working under them by first dealing with those employees.

20. The lead hands have nothing to do with the setting of the company's budget. They can only recommend or request that a type of equipment be provided. They have no authority to expend funds on behalf of the company.

21. Finally, it must be noted that the Production Division contains several other departments, that is Electronic Engineering, Drafting, Scientific Products, the Model Shop etc. Each of these departments is headed by a person classed as a "supervisor". These supervisors are placed on the same level as the lead hands in the company's organizational chart. Some of the divisions have fewer and some have more employees working in them than the divisions headed by the lead hands. There is no evidence that the supervisors of those divisions possess higher education, as a group, than the lead hands. They attend the same production meetings as the lead hands. There is little other evidence about the scope or function of the supervisors beyond the fact that they are also made to complete the yearly reports or assessments of employees that are passed on to the Director of Production. Further, the lead hands consider themselves as parallel in responsibility to those supervisors.

22. When the test of the indicia of managerial control are applied to these facts the following conclusions must be made. First, unless the lead hands are recognized as being managerial, there is a grave risk that they would be placed in a position of having to balance conflicting loyalties if left in the bargaining unit. The lead hands' responsibilities of preparing assessment reports and recommending discipline could not be properly fulfilled if his loyalty was also to protect his brothers and sisters in the bargaining unit. Similarly, his responsibilities over checking the time cards, administering the plus/minus system and maintaining production standards could often conflict with his duty to members of the bargaining unit. Second, the lead hands must be recognized as having a direct impact on the employees' wages and working conditions. Wage increases are not automatic with this company. The evaluation as prepared by the lead hand is what is used to decide what, if any increase will be granted. As such, the report seems to form "the effective basis" for the decision on wages. Further, the lead hands' ability to assign overtime gives them a direct impact on employees' income and working conditions. Third, the evidence of Mr. Sloan, the Director of Personnel, makes it clear that the lead hands again have a direct impact on the hiring and disciplinary process because of the company's policy of involving them and seeking a consensus in the decision-making process. Finally, the evidence discloses no difference between the responsibilities of the lead hand and the supervisors in the Production Department. The little evidence that is before the Board establishes instead that their responsibilities are very similar. In addition, the Director of Personnel often linked the supervisors and the lead hands together in describing their powers and responsibilities with regard to other employees. Therefore, the only evidence before us is that the lead hands' influence upon the employment and conditions of employment is the same as that of the supervisors. Those supervisors are agreed by both parties to be performing managerial functions.

23. For all these reasons, the Board concludes that the two lead hands cannot be considered to be employees within the meaning of the Act. Instead, they must be acknowledged as exercising managerial functions within the meaning of section 1(3)(b) of the Act. Therefore, they cannot be included in a bargaining unit with this company.

#### B. Community of Interest

24. As mentioned above, the unit which the applicant seeks to represent does not include employees in the three departments which are concerned with Product Development, Research and Marketing. The position of the respondent is that the unit which the applicant seeks is not appropriate because the employees in the proposed unit share a community of interest and an inseparable connection with the other three departments. Community of interest is one of the primary concerns of this Board in determining the appropriateness of a bargaining unit. As established in the case of *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526, the factors which the Board takes into consideration in determining whether a community of interest exists are the nature of the work performed, the conditions of employment, the skills of the employees, the administrative structure, the geographic circumstances and functional coherence and interdependence. With these factors in mind, the structure of the company and the relationship of the departments must then be explored.

25. Lumonics is a company which develops and builds laser products for use in government, universities and corporate research labs. It also produces industrial marking lasers with the trade name "Laser Mark". The lasers therefore have both scientific and industrial use. Lumonics can be described as a "high tech industry." Some of the products it manufactures are on a relatively high volume level. These are referred to as "standard products." It also



manufactures “special products” which are either custom built to meet particular clients’ orders, low volume products and prototype or pre-production products which may be designed and built in the hope that they will become a standard product in the future. Thus the company is involved in the designing, creating and marketing of laser products.

26. There are four departments of the company which are relevant to these proceedings: Production, Research, Product Development and Marketing. The unit which the applicant wishes to represent is essentially composed of only the Production Department. This department is basically responsible for the assembly and testing of the special and standard products.

27. The Research Department’s function is to perform contract test work for outside clients, including government; to develop or conceive new laser products; and to improve existing laser products. Product Development includes electrical engineering, drafting, technical publications and “the Model Shop”. Its prime function is seen as taking the ideas of the Research Department and transforming them “on paper” so that the product can be built.

28. The Marketing Department disseminates information to potential clients about their products and discoveries, and then receives orders for special systems. The employees in this department are also involved in the testing of the products to ascertain the viability of the design.

29. In order to understand the workings of the company and the relationship of the employees involved in this application, a review of the roles and responsibility of each department is necessary. It is perhaps easiest to do this by tracing the development of a product.

30. Dealing first with the standard product, the Electrical Engineering Division prepares the product specifications and definitions for the electronic components. These specifications are prepared by the electronic design engineering technician in conjunction with the electronic technologist and the staff scientist. Once the usage for the product has been defined, the engineering technicians implement the design by “committing” it to printed circuit boards. At this stage, they work with the design/drafting people to determine how to package the electronics. Further, the Director of Production and some of the people from his department get involved to advise on the ease of manufacture and testing; for example the supervisor of Final Testing and the lead hand for Special Products may work together. These people, together with people from Marketing, form a design review committee which has the function of defining the tests for the “total laser” for the electronic sub-components.

31. Once the design has been completed a prototype of the electronics is built by the prototype technician from Product Development. If he is building a prototype of a completely new product, it would be made in his lab. Or, if the design was for the adaptation or modification of something that has already been manufactured, he will build the prototype in the testing area for electronics or in the mechanical assembly area of the Production Department. He is also expected to create a method sheet to show the assemblers from Production how to assemble the components. Then, if the product ends up on the production line, he trains the Production people. But to complete the prototype, the technicians from Research, Production and electronic assemblers may be called in to assist in the mechanical assembly. Once completed, the prototype is tested by the Research technicians and the drawings and “bill” (or list) of required materials are updated.

32. The prototype is then put through a “production release” which involves running it through the normal manufacturing flow on a limited basis. They are built in the Production

Department often with the assistance of the design/draftsman and the prototype technician. To correct any mistakes that may surface, electronic assemblers and people from the Model Shop and Testing also assist.

33. Once it is decided to put the product into production, it goes through the normal production flow through the electronic assemblers, the product technicians and the final test area. Again, at the beginning, problems are often identified and fixed with help from the electronic assemblers.

34. The process of manufacture is similar for special products. Once the concept is defined by the special laser supervisor and the specifications are defined by the technologist or the design draftsmen, the drawings are made by the design draftsmen and/or someone from Drafting. The drawings are then released and the necessary components are purchased. Some components are then built in the Model Shop and the electronic components are built by the electronic engineering group and the electronic assembly. The mechanical assembly of the special product would be done by the special product technicians and persons from Product Development. The product is then tested by technicians from Products Development and then delivered to the customer.

35. With this structure in mind, it is now possible to assess the appropriateness of the bargaining unit with regard to the factors which make up a community of interest. The nature of the work performed by all the disputed positions can vary widely. Those people in Production are primarily responsible for the assembly of a product in accordance with instructions and designs which are given to them. In contrast, senior designers in Product Development do conceptual design work and drawings. However, the similarity of work does exist in that technologists in Product Development and Research or design/draftsmen also do the mechanical assembly of products. Similarly, testing of products is done with regard to Research, Product Development and Production.

36. But there is more similarity in many aspects of the conditions of employment for all the concerned employees. All employees work a basic 40-hour week from 7:30 or 8:00 a.m. to 4:30 or 5:00 p.m., five days a week from Monday to Friday. They are allowed half an hour for lunch. However, "flexible hours" are also allowed. There is no punch-in system for employees but they are all trusted to fill out and submit their weekly time sheets to their supervisors. Further, all employees, including some managerial staff, eat lunch and take coffee breaks in the same cafeteria. Most of the concerned employees use the same entrances to the plant. The evidence also discloses that the same benefit package is available to all employees. These benefits include holidays, a profit-sharing plan, stock options and medical benefits. There is also a "key employee" stock option plan that is only available to employees selected by the General Manager in recognition of special service. But all employees are eligible to be so selected. All employees are also able to avail themselves of the "plus/minus system" for overtime which is described above in paragraph 16. All areas of the plant use this system but it has been formally implemented in the Production Department. All employees receive an annual assessment or evaluation from their supervisors. All employees are salaried. However, the salary ranges are quite wide. The lowest salaries are in the Production Department where assemblers receive an average of \$12,225. The highest average salary paid to the Production Department employees is for the production technicians/special products. That average is \$20,176. In Product Development, Research and Marketing, the lowest average wage is \$21,000 and this increases up to an average of \$38,639 for the electronic design engineering technicians.

37. It is difficult to compare the skills of the various employees, because the nature of their work often varies and the evidence did not deal specifically with this. However, it is easier to compare their educational background. Again, these vary. The people in Product Development usually can be seen to have a Grade 12 education, with a further sixteen-week assembly course taken at a technical college. There is also a forty-week course offered at the colleges which some product technicians and most of the test technicians have completed. Three technicians in Electronic Engineering hold a two-year technician's diploma granted from a technical college. The draftsmen also have taken special technical courses. A few of the employees have university training. Two of the three electronic design engineering technicians hold a Bachelor of Science. So does the staff scientist in the Research Department. The electronic technologist has completed two years of university. On the whole, all the rest of the employees have high school education, with varying amounts of experience in the field.

38. From a physical standpoint, the mechanical assemblers area is located in one basic area of the plant, with the Research, Development and Testing located on the other side. But the final testing area, which is part of the Production Department is located in the Research and Development area.

39. The concept of functional coherence and interdependence is of primary concern to this Board. The evidence makes it clear that no product can be conceived, developed, produced and/or marketed without the involvement and interaction of the employees in Research, Product Development, Production and Marketing. Counsel for the respondent cited several instances where this would occur:

- (a) Material controllers by the very nature of their job have regular contact with Purchasing, Inspection, Receiving, Standard and Special Products, electrical design technicians, senior designers and design draftsmen.
- (b) Senior designers have regular contact with Purchasing, draftsmen, Production, standard products technicians, special products technicians, Electronic Engineering, the Model Shop, the Laser Mark product specialist, material controllers, the special lasers technologists and technicians and incoming inspection.
- (c) The product co-ordinator has regular contact with design/draftsmen, electrical design technicians, research technicians, Assembly, senior designers and machinists.
- (d) Special products technicians have regular contact with Product Development, project co-ordinator, research technologist, special laser technologists, electronic engineering design technician, test technicians, electronic assemblers and the machine shop. Production and Project Development work together in the building of the special laser.
- (e) Products Development and Research work together in the building the prototypes. Electronic assemblers and the special products technicians can also be involved.
- (f) Pre-production lasers can involve standard products technicians, proto-



type technicians, design/draftsmen, the product development technician and the electronic assemblers.

40. To summarize, it is clear that once a product has been designed and placed on a regular production run, its production could normally only involve the Production Department. But in the development and design of a new or modified product, employees from Production, Research, Product Development and Marketing must also be involved, to varying degrees. This was explained by Mr. Stathan, the project co-ordinator, when he was asked which employees were involved in the assembly of a final prototype. He said "You're going to get half the company." In addition, the men in Marketing work together with the scientists in Research and the electronic design engineering technicians and senior designers or technologists in Product Development in order to determine the feasibility of an order and the viability of a design.

41. Further, the evidence disclosed that there is a significant amount of interchange of employees from one department to another. For example, the lead hand in Standard Products has been called to assist in Special Products, Shipping, Testing and the Machine Shop. The Special Products technicians has assisted in Product Development. The production technician has assisted the research scientist. The Product Development technician has substituted as a test technician and a production technician and vice versa. Technologists in Product Development are interchangeable with research technologists.

42. The evidence also showed that employees can normally transfer and gain promotions across departmental lines. For example, a person hired as a draftsman was transferred to a product technician position. Another who was hired as a product technician was promoted first to being a test technician and then to the post of research and development technologist. A tester who was promoted to the position of test technician was then promoted to be a technologist and a research and development technologist. A receiver in the stock room was promoted to the position of product material controller.

43. From these facts, it is evident that we are dealing with a sophisticated operation in the "high tech" field. The employees concerned can be characterized as doing both technical and production work. This Board has had a tradition of certifying production employees separately from other employees. Technical employees have usually been certified with office employees because of the Board's assessment of the community of interest of such employees.

44. The first time and the only other time that this Board has been asked to deal with the situation of whether a group of technical employees ought to be included with the production unit in the high tech industry was in the case of *Fildebrandt Precision Industries Ltd.*, [1983] OLRB Rep. March 361. In that case there was a significant physical separation of the concerned employees, vast differences in skills, a lack of interdependence and very little intermingling. But the Board concluded that the technical employees should be included in the production unit for the following reasons:

The factor the Board considers most indicative of a community of interest in this case is the similarity and conditions of employment between Mr. Husk and the operators in terms of the compensation package and hours of work. These are the building blocks for any collective agreement and the homogeneity of these conditions is highly persuasive.

45. This Board has also articulated many times its concern about granting certificates that could result in the fragmentation of an operation. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board held:

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers — designed to enhance the job opportunities of employees within the walls — that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns — work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs — favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

46. Based on these principles, we are forced to conclude that a bargaining unit in Lumonics that would keep the Production Department separate from Research, Product Development and Marketing would be inappropriate in that it could create too many of the situations that collective bargaining is designed to avoid. There would be a tremendous risk of jurisdictional dispute. For example, the manufacturing and/or assembly of a product is not done exclusively by the Production Department. It would be impossible for the parties to define the precise nature of the work of each department without seriously disrupting the production flow because of the large amount of interchange and interaction of employees. Further, very few, if any products, could be produced without the involvement of each department. Thus, an intimate connection between the departments reveals a real interdependence of the employees. This is the very indicia of the existence of a community of interest. Further, to separate out the Production Department from the rest of the operation would inevitably lead to an increase in the risk of work stoppages because of undue and unnecessary fragmentation of the work force.

47. It may be that the existence of this community of interest between production and technical employees arises from the very nature of the high tech industry. The traditional separation of production and technical employees may reflect the traditional structure of the manufacturing process of traditional products. But, the emergence of the high tech industry as seen in the case of Lumonics has blurred the distinctions between design and manufacture, and creation and assembly. Thus, the older policy of dealing with production and technical employees separately may have to evolve with the changes in industry.

48. The American experience in collective bargaining has already dealt with this issue. Like our Board, the National Labour Relations Board's policy was to consider that there was no community of interest between technical and production employees. See *Litton Industries of Maryland Incorporated* (1959), 125 NLRB 722. But in the case of the *Sheffield Corporation* (1961), 134 NLRB 1101, the National Labour Relations Board was asked to reconsider that policy and decide whether there was a community of interest between technical employees and a production and maintenance unit in a high tech industry. The Board concluded:

We have carefully considered the Board's practices regarding the unit placement of technical employees as set forth in the *Litton Industries* case. We are not persuaded that the practice thereunder of automatically excluding all technical employees from production and maintenance units whenever their unit placement is in issue is a salutary way of achieving the purposes of the Act. To do so is to give primacy in unit placement to the parties' disagreement rather than to the overriding consideration of the community of interests of such employees with the production and maintenance employees. In order, therefore, to give effective weight to such community of interest, we shall no longer utilize an automatic placement formula, but shall, instead, make a pragmatic judgment in each case, based upon an analysis of the following factors, among others: desires of the parties, history of bargaining, similarity of skills and job functions, common supervision, contact and/or interchange with other employees, similarity of working conditions, type of industry, organization of plant, whether the technical employees work in separately situated and separately controlled areas, and whether any union seeks to represent technical employees separately.

Thus, the National Labour Relations Board began to consider the concept of combining production and technical employees.

49 In *Tracerlab, a Division of Laboratory for Electronics, Inc.* (1966), 158 NLRB 667, the American Board was called upon to decide the appropriateness of a bargaining unit in a high tech industry again that could include production, maintenance and technical employees.



The facts of that case are almost identical to those in the case at hand in that the company was concerned with the development of prototypes, fulfilment of special orders and the assembly of standard products in relation to nuclear radiation. The Board found as a fact that the technical aides employed skills comparable to the Assembly Department employees and that there was a frequent interchange among those employees in both departments to assist in meeting the work loads. This is similar and the fact in the situation at Lumonics. The National Board went on to conclude at page 669:

In view of the foregoing, we find that the three departments discussed above form an integral part of, and are inextricably related to, the employer's production process. Under these circumstances, and especially in the light of the similar conditions of employment applicable to all the employees discussed herein, the similarity in their skills and job functions, and their frequent interchange among the departments sought by the Petitioner and the others discussed above, we are unable to conclude that the departments requested by the Petitioner possess that degree of functional distinctness and autonomy which would warrant a finding that they have a separate community of interest. We find, therefore, that the unit sought is too narrow in scope to be appropriate. The Petitioner does not seek an election in a broader appropriate unit.

The *Sheffield* and *Tracerlab* decisions have been followed in cases such as *International Telephone and Telegraph Corporation*, (1974) CCH NLRB para. 26,890; *Ail, A Division of Cutler-Hammer, Inc.* (1974) CCH NLRB para. 15,091; *Slaughter Company* (1968), CCH NLRB para. 22,548.

50. While we are not bound by the American cases, we find them both helpful and instructive. The facts of this case do disclose a situation where the departments in question form an integral part and are interdependent in the employer's production process. Given this and the many similarities of conditions of employment to all the relevant employees, their interchangeability and frequent collaborations, we cannot conclude that it would be appropriate to certify a unit encompassing only the production employees.

51. Based on all the evidence before it, the Board is satisfied that less than 45 percent of the employees of the respondent in the bargaining unit at the time of the application was made were members of the applicant on April 25, 1984, the terminal date fixed for the application and the date which the Board determines under section 103(2)(j) of the Act to be the time for the purposes of ascertaining membership under section 7(1) of the Act.

52. This application is therefore dismissed.

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**3222-84-U Robert Williams, Applicant, v. Monarch Fine Foods Company Limited, Respondent**

**Lockout — Individual not having standing to file application for declaration of unlawful lockout — Alleged discharge contrary to Act and collective agreement not lockout — Dismissed without hearing**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

**DECISION OF THE BOARD;** March 8, 1985

1. This is an application for a declaration of unlawful lockout filed by the applicant Robert Williams. In support of his claim that he has been unlawfully locked out by the respondent, the applicant sets out the following material facts in paragraph 2 of Form 38 that he has filed.

The company have [sic] had me locked out since the fall of 1982. At the time of the lockout I was following the terms and conditions of the work contract to the letter. The company falsely accused me of being absent from work without just cause at a section 89 complaint hearing Nov. 22, 1984. The company also falsely accused me of asking for severance pay. I have never asked for severance pay as it has never been my intention to sever, but to continue work. At the same Nov. 22 hearing I did give evidence to the contrary and did prove that I was absent from work due to injuries received on the job and that I did have a valid worker compensation claim.

The work contract does call for absence due to worker compensation claims. The company did admit that they were notified of the absence, and they were not able to call any witness that could either support or corroborate [sic] any of their malicious allegations [sic]. I want the lockout declared unlawfull [sic] as the company have [sic] clearly breached their contract and the law.

2. Section 93 of the *Labour Relations Act*, which provides for application for declaration of unlawful lockout, reads as follows:

Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that an employer or employers organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

[emphasis added]

3. It is clear from the phrase emphasized that an application under that section may be filed only by a trade union, a council of trade unions, and employer or employers' organization. Therefore, an individual does not have standing to file an application for declaration of unlawful lockout (see: *Purple Heart Film Corporation*, [1979] OLRB Rep. June 551).

4. Quite apart from the absence of standing, the particulars set out in the complaint make it clear that the application relates to the discharge of the applicant, allegedly in contravention of the collective agreement and "the law", presumably meaning, the *Labour Relations Act*. While the applicant, if he is able to establish his allegations, may be entitled to relief before another forum or in other proceedings before this Board, the material facts as alleged do not fit the definition of "lockout" in the *Labour Relations Act*, which is as follows:

1.-(1) In this Act,

• • •

- (k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

5. Section 71(1) of the Board's Rules of Procedure provide as follows:

Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

6. In view of the foregoing, the Board is of the opinion that the application does not make out a *prima facie* case for the remedy requested by the applicant and must be dismissed pursuant to section 71(1) of the Board's Rules.

7. This application is accordingly dismissed.

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**1228-84-R** United Food & Commercial Workers International Union, Applicant, v. **Murray G. Bulger and Associates Limited**, Respondent

**Bargaining Unit — Whether two locations of employer having community of interest — Usarco principles applied — Board distinguishing *K-Mart* decision and finding community of interest — Computer link considered in relation to geographical proximity of two locations**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and N. Wilson.

**DECISION OF THE BOARD;** March 26, 1985

1. By decision dated September 5, 1984, the Board (differently constituted) appointed a Board Officer to inquire into and report back to the Board: on the community of interest between the employees of the respondent at the Dupont Street location and at the Yonge Street location; on all related matters concerning the definition of the bargaining unit, including the use of the term “office manager” or “department manager” and the scope of the unit as “all employees” or “office and clerical employees”.

2. Board Officer B. McLean met with the parties on September 26, October 3 and October 11, 1984 at the respondent’s premises on Yonge Street. Representing the applicant were Jim Thomas, Mike Fraser and Penny McBride. Representing the respondent were Raimo Heikkila and Chris Bulger.

3. The applicant applied for a unit described as:

all employees of the respondent employed at 1132 Dupont Street, Toronto, save and except office manager and persons above the rank of office manager.

4. The respondent replied with the following description:

all office and clerical employees of the respondent in Metropolitan Toronto, save and except department managers, persons above the rank of department manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

5. During discussions with the Board Officer, the parties agreed on the description of the bargaining unit subject to the geographic scope of the unit. That is, if, on the community of interest dispute, the Board found the Dupont location alone to be appropriate, the parties agreed on the applicant’s description. Conversely, if the Board found the larger unit appropriate, the parties agreed on the respondent’s description.

6. Witnesses called included: Chris Bulger for the Board; Noreen Reilly and Penny McBride for the applicant. A number of documents were entered as exhibits by the respondent. The Board Officer afforded the parties full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence.

7. Both parties requested a hearing before the Board to make submissions with respect to the Board Officer's report. At that hearing, the respondent introduced, on consent, two additional exhibits concerning an organizing attempt by another union of the respondent's employees. The parties agreed the exhibits were sent to all the employees at both locations. The parties also agreed that the applicant had restricted its organizing efforts to the Dupont location.

8. The applicant submitted there was no community of interest between the Yonge and Dupont locations, relying on the criteria enunciated in *Usarco Limited*, [1967] OLRB Rep. Sept. 526. The applicant reviewed the evidence with reference to those criteria. Counsel also relied on the Board's reasoning in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, particularly paragraphs 6, 10 and 11. In reply, counsel distinguished the cases cited by the respondent wherein the "department" was not found to be an appropriate bargaining unit (see paragraph 9 below). Counsel argued that the evidence supported a conclusion that Dupont was more like a "branch office" than a "department of the respondent's operations". Essentially, the applicant asserted that *K Mart Canada Limited* upheld the appropriateness of single location bargaining units, where, as here, the union had only organized that location and where, in the applicant's view, the respondent had not demonstrated that the smaller unit would result in undue fragmentation. Finally, the applicant urged the Board, in balancing the competing interests, to give weight to the wishes of the employees at Dupont for union representation.

9. The respondent also reviewed the evidence in the context of the *Usarco*, *supra*, criteria. Counsel distinguished *K Mart Canada Limited*, *supra*, on the ground that the Dupont location did not function independently, as did the different retail locations in *K Mart Canada Limited*, and plants in *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260. Counsel referred to *Bennett Foods Limited*, [1979] OLRB Rep. Dec. 1134 as an example of an integrated operation. Counsel asserted that, on the evidence, Dupont more closely resembled a "department" of the respondent and department-wide unit had been considered inappropriate by the Board. Counsel referred to: *The Regional Municipality of Halton*, [1983] OLRB Rep. Sept. 1462; *St. Joseph Hospital at Sarnia, Ontario*, [1983] OLRB Rep. June 984. The respondent contended that the Dupont and Yonge locations shared a community of interest and the larger unit would not impede employee access to collective bargaining. The Dupont location standing alone, it was argued, would result in undue fragmentation; counsel gave examples of potential difficulties and referred to *Bestview Holdings Limited*, [1983] OLRB Rep. Feb. 185 at paragraph 11.

10. The Board has reviewed the evidence and carefully considered the submissions of counsel. The Board does not intend to reiterate in detail the evidence contained in the Board Officer's report. Rather, having weighed that evidence including the relative credibility of the witnesses and what seems reasonably probable in the circumstances, the Board makes the following findings of fact in the context of the community of interest criteria enunciated in *Usarco*, *supra*.

11. Those *Usarco* criteria are summarized at this point:

(a) community of interest

- nature of work performed
- conditions of employment
- skills of employees

- administration
- geographic circumstances
- functional coherence and interdependence

(b) centralization of managerial authority

(c) economic factor

(d) source of work

12. The respondent administers benefit plans and provides consulting services of various types (actuarial, benefit, administrative system and, latterly, information system). There are several branches across Canada; in Toronto, there are two locations at present, Yonge Street and Dupont. Over the years (since the respondent commenced operating in 1958), the Toronto office has changed location a number of times, including periods where aspects of the business have been carried on in several locations within Toronto.

13. At Dupont, the work performed comprises claims payments and welfare administration; the classifications consist of claims payers, administrators and typists. In the main office at Yonge, employees similarly classified perform the same functions. However, at Yonge there are also a number of other functions as well, including account management, benefit consulting and marketing, pension administration, financial services, information systems, personnel and accounting. Additional classifications consist of programmers, data entry, mailroom and computer operations. It is important to note that the additional functions at Yonge are also provided in respect of Dupont as needed to service the Dupont location. The nature of work performed, then, differs only in that Yonge performs a number of additional functions.

14. The conditions of employment are also virtually identical. Dupont employees do have to work one Saturday morning per month each in order to provide service from 9:00 a.m. to 12:30 p.m. Not surprisingly, with respect to the common classifications, the skills of employees are identical except that, at Dupont, language skills (Italian and Portuguese) are needed by some to deal effectively with members of the various benefit plans.

15. It is appropriate to comment at this point that the Dupont location handles several trust funds for the labourers' local 183 and the labourers' multi-local benefit trust fund. The office is located in the local's building for the convenience of the members; this is also the reason for the Saturday hours and language qualification. The Yonge location handles other trust funds and provides a range of consulting services as well. There is no doubt that "Yonge" is the main operation of the respondent in Toronto. Administrative functions such as, personnel, payroll, budgets, purchasing, invoicing are centralized at Yonge and are not duplicated at Dupont. For example, Dupont employees are paid through the payroll at Yonge, the Dupont budget is set at Yonge, etc.

16. The respondent's "clients" are formally the boards of trustees of the various trust funds. The respondent designates an account manager for each of the trust funds. These account managers deal directly with the board of trustees, responding to problems in administering the trusts, "marketing" new services, and such like.

17. The administrative functions at Yonge also reveal the considerable centralization of managerial authority at that location. In addition to the functions already noted, planning and



operational changes (with respect to the clients through the account managers and the straight operation of the respondent through the management group) are carried on at Yonge for both Yonge and Dupont.

18. There is an office manager at Dupont, J. Murray, who provides the on-site day-to-day supervision. She sets staffing schedules, including the vacation schedules, directs the workforce at Dupont, etc. However, she reports to the vice-president, operations, C. Bulger, at Yonge. Decisions regarding hiring, firing, discipline and employee evaluations are not taken without consultation with or approval of her supervisor. Considerable evidence was led with respect to the extent of Murray's authority. The applicant, in particular, extensively reviewed Murray's authority in the context of his argument that she had the day-to-day autonomy analogous to the managers of retail stores noted in *K Mart, supra*. In the Board's view, the evidence falls short of the standard in *K Mart*. At present, Murray is not independent of Bulger with respect to a broad range of decision-making, especially in the "personnel" area (discipline, evaluations, etc.) affecting Dupont employees. While admittedly the frequency of such contact may decrease as Murray gains experience, the Board considers that the respondent's administrative structure and centralization of managerial authority are such as to preclude the kind of autonomy enjoyed by managers of individual retail locations. Dupont is and will remain an "extension of" Yonge. Both these factors in *Usarco*, then, lead to the finding that a single bargaining unit is appropriate.

19. In terms of geographic circumstances, the two locations are some three miles apart. What is critical, though, is that Dupont is linked to Yonge via computer. The computerization of the operations is further discussed *infra* at paragraph 22. There is also a daily courier service between both locations, delivering various reports, data, misaddressed mail, etc. "Bargaining unit" staff at both locations have relatively little day-to-day contact. There is a joint party at Christmas and golf tournament, on the social side. The applicant stressed this lack of regular daily contact between employees at both locations (who should be in the same bargaining unit, in the respondent's submission) as a factor supporting a separate unit for Dupont. However, the Board notes that the "daily contact" approach would not lead to even the claims payers and administrators at Dupont being in the same unit. Employee interaction, in the present circumstances, is not especially helpful in determining the issue before the Board. The other "community of interest" factors favour the larger unit.

20. It is evident from the findings thus far, that the Board considers the larger unit to be appropriate. The remaining factors enunciated in *Usarco* (functional coherence and interdependence, economic factor, source of work) overwhelmingly support that conclusion. Both locations function *together* to provide service in respect of the labourers' local 183 funds and the labourers' multi-local fund. Some aspects are performed at Dupont: over the counter dealings with members, claims payment, welfare administration. Others are carried out at Yonge: account managers, marketing, consulting, financial services, etc. New work in respect of those accounts is solicited at Yonge, primarily by account managers.

21. There is some evidence of permanent and temporary transfers between locations, especially with respect to the advancement of employees. Given the restricted scope of operations at Dupont, "career" development lies through Yonge Street. There is also evidence of relatively frequent transfers of work, including reports to and from Yonge for processing, work overloads, vacation and illness back-up, special projects.

22. What decisively establishes the functional coherence and interdependence of Dupont and Yonge, though, is the computerization project. This programme, adopted in early spring 1984, is well underway. The computer is located at Yonge; four terminals are slated for Dupont. In order to service the members coming in to Dupont, the employees will have to access the computer at Yonge. Moreover, work currently being performed at Dupont by administrators, such as data entry, will be transferred to Yonge, resulting in the planned loss of a number of jobs at Dupont. The intimate relationship may be simply expressed: if the computer is "down" at Yonge, Dupont will not be able to service the members of labourers' local 183 and labourers' multi-local.

23. In the Board's view, two bargaining units would hinder transfers, postings and promotions between locations. The Board considers this aspect quite serious in view of the planned reduction of the Dupont workforce as a result of the computer project. Again, the Board stresses that the project was adopted months before this certification application and is in midstream.

24. In this connection, it is also critical to note that the contract with the labourers which is the *raison d'être* of Dupont may be terminated in several ways: contract expiry; termination without cause on ninety (90) days notice or with payment in lieu of notice; termination without notice with cause; termination if one O'Hara (account manager of the labourers' accounts and senior vice-president) is no longer employed by the respondent. Termination of the labourers' contracts is not improbable: the contract was only transferred to the respondent from another administrator in 1979. Placing the Dupont employees in a separate bargaining unit would be exposing them to far greater risks than if they were in the larger bargaining unit.

25. Thus, the Board finds that the criteria in *Usarco* lead inexorably to the conclusion that there is a community of interest between the employees at Yonge and Dupont. To separate the Dupont location would result in undue fragmentation, not conducive to collective bargaining.

26. The Board, however, has also considered the decision in *K Mart* but regards that case as distinguishable. In particular, the Board reviewed the criteria in paragraph 14 of *K Mart* in the context of the present case. The absence of the necessary autonomy in the office manager's position has already been noted. The respondent does not operate from a number of "repeating" units within the municipality; Dupont is merely an extension of the Yonge operation. The Board need not decide whether Dupont is a "branch office" or a "department". Its relationship to Yonge is clearly not analogous to the several retail locations in *K Mart*. More importantly, although the applicant organized the employees solely at the Dupont location, the Board does not consider that the larger unit, in the circumstances, would "significantly impede employee access to collective bargaining" (*K Mart, supra*, para. 14, item (5)). The Board has balanced the interests of those employees who have signified they wished to exercise their right to bargain collectively and be represented by the applicant and the community of interest of those employees and the employees at Yonge. The Board, as noted, has also considered the factor of undue fragmentation, if Dupont were a separate bargaining unit. Balancing all those interests in the present circumstances, the Board finds that the Dupont location should not comprise a bargaining unit separate from Yonge.

27. Thus, having regard to the foregoing, including the agreement of the parties, the Board finds that:

all office and clerical employees of the respondent in Metropolitan Toronto, save and except department managers, persons above the rank of department manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period

constitute a unit of employees of the appropriate for collective bargaining.

28. This matter is hereby referred to the Registrar.

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**3060-83-U; 1751-84-R** Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial workers International Union, Complainant, v. Preston Springs Gardens Retirement Home, Respondent; Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union, Applicant, v. **Preston Springs Gardens Retirement Home** and 566625 Ontario Ltd. carrying on business as Madison Management, Respondents

**Practice and Procedure — Related Employer — Unfair Labour Practice — Prior Board decision and arbitration award — Whether constituting *res judicata* or issue estoppel with respect to related employer application and allegations of unfair labour practices — Both concepts applying to arbitration awards in appropriate circumstances — Discussion of conditions required for application of *res judicata* and issue estoppel — The order of proceeding where unfair labour practice complaint and related employer application**

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members J. Wilson and K. Rogers.

**APPEARANCES:** *D. V. MacDonald and C. McCormick for the applicant/complainant; Irv Kleiner and Charlotte Zigler for Preston Springs Gardens Retirement Home; B. D. Mulroney and Ed Shaw for 566625 Ontario Ltd. carrying on business as Madison Management.*

**DECISION OF THE BOARD;** March 26, 1985

1. The name of one of the respondents appearing in Board File No. 1751-84-R is amended to read: "566625 Ontario Ltd. carrying on business as Madison Management", hereinafter referred to as Madison Management. Counsel for the respondent Preston Springs Gardens Retirement Home undertook to provide the Board and the other parties with the correct identity of the legal entity which carries on business under the name Preston Springs Gardens Retirement Home.

2. There are two matters before the Board. Board File No. 3060-83-U is a complaint filed under section 89 of the *Labour Relations Act* alleging violations of sections 50, 64, 66 and 67. Board File No. 1751-84-R is an application under section 1(4) for a declaration that



the respondents Preston Springs Gardens Retirement Home and Madison Management are one employer for purposes of the *Labour Relations Act*.

3. When this matter came on for hearing, the Board heard preliminary submissions with respect to several procedural matters. After hearing the submissions of the parties, the Board dismissed the motion to consolidate these two applications. The Board ruled that the complaint under section 89 of the *Labour Relations Act* would be heard first and then the Board would deal with the application under section 1(4). The Board also ruled that the evidence in the section 89 proceeding which is relevant to the application under section 1(4) would be applicable to the proceeding under section 1(4) and further that the respondent Madison Management would have the right, as an interested party, to participate in the section 89 proceeding. Counsel for the respondents requested an order excluding witnesses, which was opposed by counsel for the complainant/applicant. The Board, after hearing brief submissions from all counsel, ordered that witnesses be excluded from the hearing.

4. The Board then received detailed preliminary submissions over the course of two days with respect to whether the complaint and application should be entertained by the Board. After hearing the submissions of all counsel, the Board recessed to consider those submissions and returned to deliver the following oral ruling:

#### ORAL RULING

Counsel for each of the two respondents have submitted, by way of preliminary motion, that this Board should dismiss the complaint under section 89 of the *Labour Relations Act* and the application for a declaration under section 1(4) of the *Labour Relations Act* filed by the Health, Office & Professional Employees, Division of Local 206, Retail, Commercial and Industrial Union, Chartered by the United Food & Commercial Workers International Union, hereinafter referred to as the Union, on the grounds that the matters in both proceedings are *res judicata* by virtue of a previous decision of the Ontario Labour Relations Board (see *Preston Springs Gardens Retirement Home*, [1984] OLRB Rep. Sept. 1241) and a previous arbitration award (see *Preston Springs Gardens Retirement Home*, unreported, June 5, 1984, Lerner), or that the Union is precluded from asserting factual positions that are contrary to the findings of fact made by the Board and by the arbitrator in those earlier proceedings between the Union and the respondent Preston Springs Gardens Retirement Home.

The respondents argue, in the alternative, that if issue estoppel or *res judicata* are not applicable, the findings of fact made by the Board and by the arbitrator are, if not conclusive, of much weight and ought to be relied on by the Board at the very least, to shift the initial burden of adducing evidence from the respondent in the section 89 proceeding to the Union.

Counsel for the Union argued that *res judicata* and issue estoppel were not applicable in this matter because the earlier proceedings involved different causes of action and that the facts upon which the respondents seek to rely were not necessary to those decisions. He further submitted that the Board should, in any event, refuse to apply the principles of *res judicata* and issue estoppel to decisions of arbitrators.

The decision by the Ontario Labour Relations Board to dismiss the Union's earlier application under section 93 of the *Labour Relations Act* in respect of an unlawful lock-out did not deal with all of the allegations made by the union in the complaint under section 89 of the Act or in the application for a declaration under section 1(4) of the Act which are before us. The Board has applied a doctrine analogous to *res judicata* for reasons that need not be articulated here. The principle applied by the Board has been set out in *Arnold Markets Limited* 61 CLLC ¶16,221 at page 992 in the following way:

"It seems obvious that as a general rule, once a fact or question *has been put in issue and directly adjudicated upon in a proceeding before the Board*, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and *involving the same questions or facts decided by it in the first decision . . .*"

[emphasis added]

However, the Board must be cautious not to apply that principle too broadly. In our view, *res judicata* only arises where a party attempts to re-litigate the same issues arising out of the same transaction or conduct that have been finally determined elsewhere in a proceeding involving that party or a privy to that party. The issue before the Board with respect to whether a lock-out occurred is clearly different from whether there has been a breach of sections 50, 64, 66, and 67 of the *Labour Relations Act*, as is alleged by the Union in this section 89 complaint. Similarly, we do not find that the award of the arbitrator, who dismissed a grievance alleging that the sub-contracting of bargaining unit work was a violation of the collective agreement, decided the issue of whether the respondent Preston Springs Gardens violated those sections of the *Labour Relations Act*. However, we are satisfied that the issue of whether the collective agreement was violated was dealt with by the arbitrator.

The Union relies on an alleged violation of section 50 of the Act in its complaint which is founded on an alleged violation of the collective agreement. To that extent, we are satisfied that that particular issue is *res judicata*.

During the course of reply argument, we advised counsel for the respondent Madison Management that we did not have to hear his response to the Union's submission that issue estoppel and *res judicata* should not be applied by this Board in relation to arbitration awards. We are satisfied that this Board should apply the doctrines of *res judicata* and issue estoppel in relation to proceedings before arbitrators or boards of arbitration, when the issues in the arbitration proceedings and before this Board are identical, and the jurisdiction of the arbitrator and this Board to grant the relief sought in both proceedings are the same. In our opinion, the principle that this Board applies in deferring matters that come before us to grievance arbitration under collective agreements suggests that once an arbitration award deals with the issue that would have otherwise come before this Board, that issue cannot be brought back to the Board by the party that was unsuccessful at arbitration, except in the most unusual of circumstances. The Board's policy on deferral to arbitration was set out in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, where the Board wrote at paragraph 7, page 1258-1259:

"It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶17,083; *John Inglis Co. Ltd.* (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶16,623; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶16,198 and *Collingwood Shipyards*, [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. *These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created.* See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair

labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para. 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.* (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited*, *supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited*, *supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard* and *Stephenson*, *supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues."

[emphasis added]

The Board exercised its retained jurisdiction in *Somerville Industries Limited*, [1979] OLRB Rep. June 577, where it initially deferred the issue of the discharge of an employee to arbitration, but permitted the matter to come back before the Board for adjudication when the arbitration process did not deal with the issue that was put before the Ontario Labour Relations Board originally. The same policy was applied by the Board in *The Canadian Union of Operating Engineers and General Workers*, [1983] OLRB Rep. Oct. 1633, when it refused to hear a complaint involving the discharge of an employee after that matter had been dealt with through grievance arbitration. The Board stated at paragraph 8 of that decision:

"Turning to the alleged discrimination against Mr. Norton, we believe deferral to arbitration is the appropriate course. As the collective agreement contains both a "just cause" and a "no discrimination" clause, the contractual protection afforded to the complainant is as broad as that available under section 66 of the *Labour Relations Act*. The case has already proceeded to arbitration and no objection has been taken to the fairness of that hearing. In these circumstances, another round of adjudication would merely serve to prolong the dispute and to waste resources, both public and private. For these reasons, we defer to the arbitrator's finding that Mr. Norton was not the victim of discrimination motivated by his union activities. In light of this conclusion, the Board's broad remedial mandate cannot be a ground for assuming jurisdiction."

Since we are satisfied that issue estoppel and *res judicata* should be applied by this Board in relation to arbitration awards, the Union's complaint, insofar as it relates to an alleged violation of section 50 of the *Labour Relations Act* is hereby dismissed.

However, the next issue we must consider is whether issue estoppel applies to the facts before us. In our view, before issue estoppel can arise with respect to the issues resolved in an earlier determination, those issues must have been a necessary or integral part of that determination. Mr. Justice Dickson, for the majority in the Supreme Court of Canada, described the principle of issue estoppel in this way in *Angle v. Minister of National Revenue*, (1974), 47 D.L.R. (3d) 544 at page 555-556:



“The second species of estoppel *per rem judicatam* is known as “issue estoppel”, a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it “issue-estoppel”).

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:

... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Is the question to be decided in these proceedings . . . the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of de Grey, C.J., in the *Duchess of Kingston's Case* (1776), 20 St.Tr. 355, 538n, quoted by Lord Selborne, L.J., in *The Queen v. Hutchings* (1881), 6 Q.B.D. 300 at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551. The question out of which the estoppel is said to arise must have been “*fundamental to the decision arrived at*” in the earlier proceedings: *per* Lord Shaw in *Hoysted v. Commissioner of Taxation*, [1926] A.C. 155. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. (1969), pp. 181, 182, quoted by Megarry, J., in *Spens v. Inland Revenue Com'rs*, [1970] 3 All E.R. 295 at p. 301 set forth in these words the nature of the inquiry which must be made:

... whether the determination on which it is sought to found the estoppel is “so fundamental” to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.”

[emphasis added]

That same approach was adopted by the Divisional Court of the Supreme Court of Ontario in *Tandy Electronics Ltd. v. United Steelworkers of America et al* (1980), 80 CLLC ¶14,017 at page 91 where the Court wrote:

“In general terms, the continuing responsibility of the Board to monitor the relationships between companies, unions and employees may often render it necessary and essential for the Board to consider prior decisions made by other panels. So long as those prior decisions involve the same union and the same company, are relevant to the issue under consideration, then it would seem to be appropriate for the Board to refer to those decisions. *The extent to which they can be utilized must be restricted to the actual decision of the Board together with those findings of fact made by the Board that were essential to its decision. No other findings of fact or evidence that may be contained in the decisions should be considered.*”

[emphasis added]

See also *Doral Construction*, [1980] OLRB Rep. May 693.

In our opinion, the Board's determination in the lock-out application that the decision was irrevocable was the principal factual issue “fundamental to the decision arrived at”, as that term was used by the Supreme Court of Canada in the *Angle* decision. That decision made the Board's other findings with respect to economic justification for the respondent's

conduct unnecessary to the final result. Thus, issue estoppel does not arise from the Board's lock-out decision in respect of the respondent's motivation.

As for the arbitration award, counsel for the union conceded that the issue of anti-union animus was dealt with by the arbitrator, but, he submits, only in relation to the *bona fides* of the employer's contracting-out decision. He submits that the determination of whether sections 64, 66 and 67 of the Act were violated was not placed before the arbitrator. Counsel for the respondent Preston Springs Gardens submits that the arbitrator's finding of no bias against the Union was a finding on the issues presented to him and was necessary to the final result.

It must be remembered that this matter is being dealt with by the Board by way of preliminary arguments. We are unsure on the submissions whether the arbitrator did actually deal with all of the allegations raised by the Union in its complaint under section 89. Thus, it is premature to dismiss the complaint of the Union on the basis of issue estoppel since we are not satisfied that the arbitrator's determination of no anti-union motive was necessary to his ultimate decision.

Counsel for the respondent Madison Management also argued that *res judicata* and issue estoppel applied as a result of the arbitration award in respect of the Union's application for a declaration under section 1(4) of the Act. In our view, the arbitrator needed only to determine whether Preston Springs Gardens was or was not the employer of the employees. He found that it was not. The determination of whether Preston Springs Gardens exercised control over Madison Management or vice versa, in respect of directing employees, is not necessarily the same issue that the Board would be faced with in the section 1(4) application and in any event, may not have been fundamental to his determination dismissing the grievance.

We are not satisfied that the arbitration award and the previous Board decision provide conclusive proof of the facts related in them. However, the weight, if any, that the Board should give to those determinations is a matter of evidence that is best left to the panel of the Board which will be scheduled to hear this matter.

Therefore, the preliminary motion made by the respondents is dismissed, but for the allegation of the union which relies on section 50 of the *Labour Relations Act*, which we have dismissed earlier.

We wish to emphasize that this decision should not be construed as an invitation to any party who feels aggrieved by an arbitration award to seek the same remedy by coming before this Board. Our ruling has turned on the narrow legal issue of whether *res judicata* or issue estoppel prevents the complaint and application of the Union from being heard on their merits. Our determination does not, in any way, suggest what the Board's ultimate decision may be in respect of either proceeding.

5. After the Board delivered its oral ruling, the parties then requested the Board to determine the order in which the parties would present their cases in the section 89 and 1(4) proceedings. After hearing the submissions of the parties, the Board ruled that the normal order of proceeding in section 89 matters where the reverse onus under section 89(5) is triggered should be followed in this case, and therefore the respondent Preston Springs Gardens should proceed first with its evidence in relation to the complaint filed by the Union. (See *I.C.B. Warehousing Division of Alar-Anson* [1976] OLRB Rep. Oct. 621.) The Board did not rule on whether the respondent Madison Management was required to proceed first to discharge its burden, if any, under section 1(5) of the Act. The Board was of the opinion that the procedural issue raised by counsel for Madison Management with respect to the section 1(4) application could be renewed by him before the panel of the Board hearing that application after the hearing of the section 89 complaint has been completed and the parties are about to commence the hearing into the section 1(4) application.

6. After ruling on the procedural matters raised by the parties, the Board was advised by the parties that the complaint and application would require several days of hearing in order to be completed. Therefore, this matter is referred to the Registrar to schedule the continuation of the hearing in this matter in consultation with the parties.

7. This panel of the Board is not seized with this matter.

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**0999-84-U Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Complainant, v. Simpsons Limited, Respondent**

**Change in Working Conditions — Interference in Trade Unions — Unfair Labour Practice — Whether lay-offs for first time during freeze period “business as before” — Whether lay-offs resulting in eliminating whole classification — Lay-offs resulting from pre-existing centralization program foreseeable and not unlawful — Lay-offs resulting from contract out unlawful alteration of terms of employment or privilege — Impact on union not making employer action motivated by business reasons unlawful interference**

**BEFORE:** Ian C. Springate, Alternate Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *James Hayes and Patrick Macklem for the complainant; T. F. Storie and E. Bengert for the respondent.*

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; March 6, 1985**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent has violated sections 64 and 79 of the Act.

2. On June 29, 1984 the complainant trade union applied to the Board to be certified as the bargaining agent for certain employees of the respondent at its store in Oakville. On or about July 11, 1984, the respondent announced the termination of a substantial number of employees at its stores in eastern Canada, including certain employees at its Oakville store. The complainant does not allege that the termination of employees at the Oakville store was motivated by anti-union considerations. The complainant does, however, contend that the respondent's actions were in breach of the “freeze” on terms and conditions of employment provided for in section 79(2) of the Act, and also involved an interference with the representation of employees by the trade union contrary to section 64.

3. In recent years the respondent has suffered heavy financial losses from its retail operations, prompting it to consider methods of reducing its operating costs. In the Fall of 1983 a management committee was established to develop a plan by which savings in operating costs could be achieved. This committee developed a proposed formula which provided for both an absolute allowable wage dollar ratio to sales in each store, and also set a target ratio of what proportion of sales staff should be “full-time” employees and what proportion “contingent”



employees. In the respondent's terminology, "full-time" employees are those regularly scheduled to work the normal full-time hours, whereas "contingent" employees are offered work in accordance with the company's needs, and are free to either accept or reject the hours of work offered to them. With the exception of the company's main downtown Toronto store, the target set by the committee was to have "contingent" employees comprise 60 per cent of sales staff in each store and "full-time" employees the remaining 40 per cent.

4. The proposal to set an absolute allowable wage dollar ratio to sales in each store, and to implement a set contingent/full-time staff ratio, was quickly approved by the company's senior executives. Also approved were certain proposals to reduce the number of non-sales staff employed in the stores. As early as April 1984, certain preliminary determinations were made concerning how the proposals would be implemented. A final implementation plan was decided upon in June, 1984. The staff at all the stores, including the Oakville store, were advised of the various changes, including the termination of a number of employees, on July 11, 1984. The complainant trade union was not given any advance notice of the changes. It will be recalled that the union had filed its application for certification on June 29, 1984.

5. In its application for certification the trade union asked that it be certified to represent all employees of the respondent at Oakville, save and except managerial staff, office and clerical employees, and persons regularly employed for not more than 24 hours per week. As of the application date, there were 64 employees in the bargaining unit. These employees were mainly classified by the respondent as "full-time", although there were also eight "contingent" employees who, based on the Board's "7-week test", were regularly employed in excess of 24 hours per week and hence came within the bargaining unit.

6. The contingent sales staff appear not to have been directly affected by changes at the Oakville store, which is to say that they will continue to be offered work in accordance with the needs of the store, and will be able to accept or reject the hours offered. There was, however, a major impact on the full-time personnel. On July 11, 1984, eighteen employees in the bargaining unit were advised by the respondent that they would not be continued past November 3, 1984. Ten of these eighteen employees were full-time sales staff, two were receiving staff, three were cleaners and three were alterations personnel.

7. In selecting the ten sales staff to be given notice of termination, the respondent generally selected those with the least seniority. Exceptions were made for employees who worked in specialized departments where it was felt their particular skills would continue to be required, as well as employees in the cosmetic department who were viewed as having specialized skills, and whose salaries were in part subsidized by the companies whose products they sold. There is no allegation that the respondent considered employee support for the trade union in deciding which employees were to receive notice of termination.

8. Prior to July 11, 1984, the respondent's "full-time" employees included both commissioned sales staff and non-commissioned staff. Primarily as a result of the layoffs announced on July 11th, no "full-time" non-commissioned sales staff remain in the bargaining unit. All remaining "full-time" staff are now on commission. The respondent still employs "contingent" staff on a non — commission basis. Most of these contingent employees regularly work less than twenty-four hours per week and are excluded from the bargaining unit. However, as already noted, some contingent employees do regularly work more than twenty-four hours per week and are included in the unit. Because of this, a small number of non-commissioned sales staff do remain in the bargaining unit.

9. The three cleaners given termination notices were the only cleaners employed at the Oakville store. Their termination was the result of a decision to contract out cleaning work, a decision which affected employees at other stores as well. It is of some interest that when the Oakville store commenced operations in 1981, cleaning services in the store were provided by a private contractor. However, due to dissatisfaction with the contractor's performance, the company terminated its services and began to directly employ cleaners. The contracting out of cleaning work and the termination of the three cleaners thus returned the situation to what it had been when the store first opened.

10. Prior to July 11, 1984, the respondent employed three "full-time" and four "contingent" employees to perform receiving work. However, as part of an on-going program of consolidating the merchandise processing functions at a central location in Metropolitan Toronto, shortly after July 11th the respondent terminated two of the three full-time receiving employees. The remaining work at the Oakville store continues to be performed by one full-time receiver with assistance from the contingent employees.

11. All three full-time alterations employees at the Oakville store were terminated. This was as a result of a decision to centralize the alteration work previously performed at various stores in the general Toronto area at the respondent's Downtown and Yorkdale stores. The alterations employees at the various stores were given a special notice of termination advising them that they could exercise their seniority with respect to the alterations positions at the two remaining locations. None of the three alterations employees at Oakville had sufficient seniority to be awarded a position, and accordingly they were among those terminated.

12. The employees at the Oakville store who were terminated subsequent to July 11th, were clearly let go not because of any alleged wrongdoing on their part, but because of the respondent's conclusion that their services were no longer required. This type of action is generally regarded as falling within the category of a "lay-off". The respondent had not previously laid off any employees from its Oakville store. However, employees, including a number of retail employees, had in the past been laid off at other locations.

13. As already noted, although the complainant trade union accepts that the respondent's decision to lay off employees at the Oakville store was not motivated by any anti-union considerations, it does contend that the layoffs involved a violation of the section 79(2) "freeze", which provides as follows:

Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

14. Section 79, read as a whole, manifests a legislative intent to maintain existing patterns of an employment relationship while the parties are formalizing their collective bargaining relationship. Section 79(2) ensures that there will be a fixed basis from which to begin negotiations, while a similarly worded section 79(1) ensures that the status quo will be preserved during the bargaining process itself. Section 79 prevents unilateral alterations in the status quo

which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The Board does not view section 79 as a straitjacket which prevents an employer from continuing to manage its operation. Rather, the Board views the section as requiring an employer to continue to run its operations in accordance with pre-existing patterns. The right to manage is maintained, qualified only by the condition that the operation be "managed as before". See: *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859.

15. In the instant case, the respondent contends it had a pre-existing right to lay off employees, and hence its action in doing so was a form of management as before. While acknowledging that it has not previously laid off employees at its Oakville store, the respondent points to the fact that it has laid off employees at other locations. The complainant, however, contends that since no employees had previously been laid off at Oakville, the lay-off of employees at that store involved a departure from established practice. The complainant also contends that the fact there are no longer any "full-time" sales staff (as that term has been used by the respondent) employed on a non-commissioned basis in the bargaining unit is itself a departure from the respondent's previous practice. The complainant also relies on the fact that no alterations work continues to be performed in the Oakville store, that some of the receiving function is performed elsewhere and the cleaning work has been contracted out.

16. In dealing with this matter, we would first note that the Board has in a number of cases concluded that section 79 is a "strict liability" section, in the sense that it is applicable even in the absence of anti-union motivation on the part of an employer. See: *Beaver Electronics Limited*, [1974] OLRB Rep. March 120. Accordingly, the fact that the respondent's actions were not motivated by improper considerations is not a factor with respect to the alleged breach of section 79. Further, we do not regard it as relevant that the respondent had been actively considering the changes prior to the filing of the application for certification. In order for a freeze period to operate effectively, it must be in relation to rights and privileges known to both the employer and employees. A decision taken before the freeze but known only to the employer, could be revoked or altered by the employer prior to communicating it to employees. Accordingly, the Board has consistently held that a firm decision to change terms and conditions of employment can escape a freeze only if it has been communicated to employees prior to the onset of the freeze period. See: *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244.

17. This case raises difficult issues about the restrictions which section 79 places on an employer during the freeze period. In the *Sunnycrest Nursing Home Limited* case, [1982] OLRB Rep. Feb. 261, the Board made the following comment relating to the basic difficulty in interpreting section 79:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

18. In a number of cases the Board has concluded that management has a general right to lay off employees during a freeze, provided the decision is not itself an unfair labour practice. See, for example, *Burlington Carpet Mills Canada Ltd.*, [1980] OLRB Rep. Oct. 1361; *The Winchester Press Limited*, [1982] OLRB Rep. Feb. 284 and *Gray Owen Sound Joint Homes*



for the Aged, [1983] OLRB Rep. April 522. This conclusion appears to be based on the premise that it is an established employer right to increase or decrease its work force as conditions dictate. This general right is recognized even in situations where changing circumstances have caused an employer to decide to lay off employees for the first time. This point is expressed in both the *Winchester Press* and the *Grey Owen Sound* cases, *supra*. We agree with this approach. While the purpose of the freeze is to maintain the current situation, part of the situation is the ability of management to adjust its manpower levels to meet changing circumstances. The adjustment of manpower levels is not, by itself, an alteration in the method of carrying on business or a move away from "business as before". Although the respondent had not previously laid off employees at the Oakville store, it had done so at other stores and, in our view, it continued to have the right to do so at the Oakville store. Accordingly, in our view, the respondent's action in laying off its sales staff did not by itself constitute a violation of section 79(2).

19. As indicated above, one result of the lay-off of ten sales staff is that there are no longer any "full-time" non-commissioned sales staff at the Oakville store, albeit contingent sales staff continue to be paid on a non-commissioned basis, and some of these contingent employees come within the bargaining unit. The complainant analogizes this situation to that described in the *Rest Haven Nursing Home* case, [1979] OLRB Rep. June 554, where the Board concluded that the elimination of a bargaining unit classification resulting from the transfer of work to a different classification outside of the bargaining unit involved a breach of a statutory freeze period. In our view, the reasoning in the *Rest Haven* case is not applicable to the facts of this case. Here there has not been a replacement of one group of employees by another, but instead a net decrease in the total number of employees. The sales staff who remain continue to be paid as before, and some in the bargaining unit (the "contingents") continue to be paid on a non-commissioned basis. We are satisfied that there has not been the type of restructuring of the work force which would result in a breach of section 79(2) of the Act.

20. The situation with respect to the other employees who were laid off is somewhat different. They were not laid off simply as part of a reduction of staff at the Oakville store. Rather their lay-offs resulted from the implementation of different ways of carrying on certain operations. It will be recalled that two receivers were laid off in connection with an on-going program of centralizing the merchandise processing function. Three alterations staff were laid off as a result of centralizing the alterations work for all Toronto area stores, and three cleaners were laid off as a result of a decision to contract out the cleaning function at the store.

21. The situation with respect to the receivers is the simplest one to deal with. The only evidence before us with respect to the matter consists of a brief agreed-to statement, the relevant parts of which state as follows:

The decision to eliminate . . . (the receiving) function was the result of an ongoing program over the past two years to consolidate all of the merchandise processing functions in a central location in the Lawrence Avenue Service Building. Prior to July 11th, there were three full-time and four contingent employees working in this function. Two of the full-time employees were terminated shortly following the July 11th notice.

From this agreed-to statement, it appears that prior to the filing of the union's application for certification there was already in place a program designed to consolidate merchandise processing functions, and that the layoff of two receiving employees was part of this program. This

being the case, the layoff of these two individuals did not mark a departure from the status quo, but rather was a consequence of a pre-existing program. In these circumstances, we do not view the layoff of the two receivers as involving a violation of section 79(2).

22. The changes affecting the alterations staff and the caretakers cannot, however, be described in terms of "business as before". These changes did not involve simply an adjustment in the number of staff being utilized to carry on an existing method of operation, or the continuation of a pre-existing program of change. Rather, the changes arose out of a departure from the manner in which the respondent had been carrying on certain aspects of its business. Alteration work previously performed at the Oakville store is now being done elsewhere. Cleaning work continues to be done in the store, but by employees of an outside contractor. In our view, nothing turns on the fact that when the Oakville store first opened, the respondent utilized the services of a cleaning contractor. Prior to the application for certification, the respondent had changed its method of operation so as to directly employ cleaning staff. That was the situation in place when the section 79(2) freeze came into force, and hence is the appropriate reference point. We view the laying off of the alterations and cleaning employees as a result of changes in the respondent's method of operations as involving an alteration to the employer-employee relationship. If the layoffs did not actually involve an alteration to the terms and conditions of employment of the six employees in question, we are satisfied that they did involve an alteration of the privileges enjoyed by the employees contrary to section 79(2). A privilege is essentially a benefit received by employees to which they have no legal claim. As the Board noted in the *St. Mary's Hospital* case, [1979] OLRB Rep. Aug. 795, a privilege can be created by a course of conduct which gives rise to a reasonable expectation on the part of employees that an existing benefit will be continued. In the instant case, we believe that the respondent's sales employees would reasonably have expected that they might be laid off as a result of the respondent having to adjust its manpower levels. The receivers would have been on notice of possible lay-offs because of an ongoing centralization program. However, having regard to the manner in which the respondent conducted his business prior to the onset of the freeze, we believe it unlikely that the cleaning and alterations staff would reasonably have contemplated that they would lose the benefit of continued employment with the respondent as a result of the firm changing its methods of operation. To this extent an employee privilege protected by section 79(2) has been unlawfully altered.

23. Our conclusion that the respondent violated section 79(2) is, we believe, in line with the general thrust of the Board cases. In this regard we would refer specifically to the *Rest Haven* case discussed above, as well as to *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147. In the latter case the Board concluded that the laying off of all employees in the classification of telephone operator by a taxi company with the intent of having their work performed by dispatchers was in violation of section 79(2). At the hearing into this matter, counsel for the respondent referred us to the Board's decision in *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261, in which the Board held that the laying off of employees as a result of contracting out certain work did not violate the provisions of section 79(1). The facts in that case, however, were very different from the facts of the instant case. In the *Town of Petrolia* case, the employer had, prior to the freeze, embarked on a program leading up to the subcontract, and the employees involved would have reasonably been aware of this program.

24. Our finding that the respondent violated the section 79(2) freeze with respect to the layoffs of the cleaning and alterations staff does not mean that the respondent is necessarily foreclosed from ever making the changes it desires with respect to alterations and cleaning.

The freeze is meant to stabilize the situation for a fairly limited period of time. If the section 79 freeze expires without a collective agreement being negotiated, the respondent will be entitled to unilaterally make the changes. If a collective agreement is entered into, then the management's rights provisions agreed to by the parties may or may not entitle the respondent to make the changes it desires during the life of the agreement. It is, however, a breach of section 79 for the respondent to make the changes unilaterally during a freeze period.

25. The complainant alleges that the respondent's conduct is also in breach of section 64 of the Act. Section 64 provides as follows:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

26. It is the contention of the complainant that the layoff of employees involved a form of interference with the representation of employees by the union. We do not agree. While section 64 clearly proscribes employer conduct aimed at interfering with the representation of employees by a trade union, in our view, it does not make improper all employer conduct motivated by business concerns which incidentally impacts on a trade union's ability to represent employees. Given the facts of this case, there is no need to deal with the question of whether some employer conduct might be so detrimental to a trade union's ability to represent employees that even lacking an improper motivation, it will be in violation of section 64. In our view, the laying off of employees as part of a *bona fide* attempt to cut business losses does not amount to a violation of section 64. Accordingly, this aspect of the complaint cannot succeed.

27. The complaint insofar as it alleges a violation of section 64 of the Act is dismissed. Likewise the complaint insofar as it alleges that the layoff of the ten sales staff and two receiving employees was in violation of section 79(2) of the Act is also dismissed. The complaint with respect to section 79(2) does, however, succeed insofar as it relates to the three cleaners and three alterations staff. We propose to leave the matter of remedy to the parties. However, we will remain seized of the matter in the event they are unable to agree upon the appropriate remedy.

#### **DECISION OF BOARD MEMBER F. W. MURRAY;**

1. I dissent.

2. I would have found that the laying-off of the cleaning staff was part of the ongoing program to reduce operating costs and, as such, should not be considered as a breach of the "freeze" provision of section 79(2) of the Act.

3. In so finding I have kept in mind the other massive changes the respondent has found necessary to make. I find it impossible to differentiate between laying off staff as a result of the "continuation of a pre-existing program of change", or the relocation of work such as the alteration staff experienced, as opposed to the subcontracting of work to an outside agency — a practice not new to the respondent. All involve changes in the method of operations.



4. While I am aware that this approach is inconsistent with the *Rest Haven* and *Windsor Airline Limousine Services Ltd.*, it is consistent with the decision in the *Town of Petrolia* case. One factor in the case at bar that was not present, at least to the same degree, in all three of the above-mentioned cases was the suffering of heavy financial losses which prompted the major changes in operation necessary to reduce operating costs.

5. I would have found that all of the changes were the result of an attempt to cut business losses and to the extent that management has the right to manage the business or to use the overworked phrase "business as usual" in the particular economic environment in which it finds itself, I would not have found that this laying-off of the cleaning personnel and the replacing thereof with the staff of an outside agency to be in violation of the freeze provision of section 79(2) of the Ontario *Labour Relations Act*.

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**2024-83-M** The Bricklayers, Masons Independent Union of Canada Local 1, Applicant, v. The Masonry Contractors Association of Toronto Inc. and **Skyline Construction Masonry Limited**, Respondents

**Arbitration — Construction Industry Grievance — Practice and Procedure — Remedies — Employer paying union amounts awarded to grievors in prior Board arbitration award — Claiming union misappropriated money and did not hand over to individuals as required in Board award — Whether Board having authority to enforce its arbitration awards**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members A. Grant and H. Kobryn.

**APPEARANCES:** *Maureen Farson and John Meiorin for the applicant; David R. Rothwell and Bernardo Mattacchione for the respondents.*

**DECISION OF THE BOARD;** March 21, 1985

1. This matter arose because of the respondent, Skyline Construction Masonry Limited's (Skyline) request for the Board to deal with matters concerning an earlier award of the Board between the parties on a section 124 application of the union. The history of these proceedings are unusual.

2. The union referred a grievance to the Board pursuant to section 124 alleging that Skyline and the Masonry Contractors Association of Toronto Inc. had violated the travel expense provisions of their relevant collective agreements. In a decision dated August 13, 1984, the Board found that the collective agreements had been violated when Skyline issued travel expense cheques to employees in order to appear to be in compliance with the collective agreement, but then required that the employees return the monies to the company. This is outlined in paragraph 21 of the Board's decision:

We have no hesitation in concluding that the company's actions were in violation of article 14 of the collective agreements, for in the end the employees did not receive the required amount of travel expenses. In our

view, nothing turns on the fact that at one point some of the employees indicated that they were prepared not to receive travel expenses. The requirement that travel expenses be paid is found in the collective agreements with the trade union, and not with the employees.

After reaching this conclusion, the Board turned to the issue of which employees had been denied their travel expenses. The Board concluded in paragraph 25:

Having regard to all of the above, we are satisfied that the following employees are due the following sums. . . .

W. Kronberg \$468.97  
 P. Parravano 504.97  
 L. Parravano 564.00  
 D. Perum 336.00  
 G. Lelonzi 924.00  
 G. Sousa 312.00  
 F. Pulsanelli 12.00  
 A. Prata 936.00  
 A. Margotta 936.00  
 G. Capisciolti 912.00  
 A. Ferreira 936.00  
 V. DiLeta 936.00  
 E. Pellizzer 780.00  
 A. Petrozzi 564.00  
 C. Micera 365.00  
 F. Santoli 24.00  
 D. D'Urzo 420.00  
 B. Fry 84.00

In addition, the Board also ordered Skyline to pay 10% interest on all the monies owing plus \$500.00 because of the parties' provisions for such payments in their collective agreements. The final order of the Board in paragraph 31 reads:

Having regard to the above, we hereby direct Skyline Bricklayers Ltd. to pay to the applicant, in trust for the employees, the amounts referred to in paragraph 24 above, with an additional 10% interest on each case. We further direct Skyline Bricklayers Ltd. to pay to the applicant for its own use, the sum of \$500.00.

3. Following the issuance of the award, Skyline paid the full amounts ordered by the Board to the union. However, we were told that shortly thereafter Skyline developed a concern upon discovering that the union had not paid the money over to the named workmen. Instead, it was said that the union had required the workers to issue directions authorizing the union to retain the monies received in trust on the members behalf. (For purposes of these proceedings we are simply assuming that the alleged facts are true without having gone into the merits of the allegation.) Because of Skyline's concern, it requested that the Board convene and compel the union to pay the stated amounts over to the named workers in compliance with the Board's earlier award.

4. At the outset of the hearing, counsel for the union raised a preliminary objection to the proceedings, arguing that the Board has no jurisdiction to enforce its awards and that the employer has no authority to act on behalf of the employees. Without admitting that the union had acted wrongly in any way, it was submitted that even if any wrong had been done, only the employees have status to raise such a complaint. Counsel for the union referred us to the following cases:

*Re Consumers' Gas Co.* (1974) 6 L.A.C. (2d) 61, *Operative Plasterers' and Cement Masons' International Association of the United States of America, Local 48*, [1974] OLRB Rep. March 169, *International Association of Bridge, Structural & Ornamental Iron Workers*, [1982] OLRB Rep. Feb. 233 and *Labourers International Union of North America, Local 527*, [1981] OLRB Rep. Dec. 1775.

5. Counsel for Skyline argued that the Board must have jurisdiction to ensure compliance when it orders monies to be paid in trust for named employees. Skyline submitted its status to bring these proceedings arises from its role as the settlor of the trust for the employees and that as such, it has the right to ensure that the terms of the trust are being faithfully fulfilled. Finally, Skyline stressed that the Board ought to be able to assist individual union members in rectifying an alleged "misappropriation" of funds in order to avoid the necessity of individuals lodging costly and lengthy civil proceedings.

### Decision

6. The Board ruled on the preliminary issue at the hearing and promised that these reasons would follow.

7. When the parties first came before this Board on this issue, it was by way of a section 124 referral of a grievance. Thus, the Board was called upon to act as an arbitration board in a dispute in the construction industry. Section 124(3) provides that section 44(11) of the Act applies in such arbitrations. Section 124(3) simply gives the Board jurisdiction to deal with the "differences or allegations" raised in the grievance:

Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 44(11) sets out the jurisdiction and procedure with regard to the enforcement of decisions:

Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such.

It is clear that the Act does not give this Board or an arbitration board the power to enforce its awards. Instead, the Act creates a mechanism for a party to utilize in order to ensure enforcement.

8. What Skyline is essentially requesting in this proceeding is that the Board compel enforcement of its earlier decision between the parties. Skyline alleges that the union has breached the award by failing to honour the trust created by the Board on behalf of the employees. While such an allegation may give rise to rights of employees or the respondent to bring an application under another section of this Act, or it may inspire them to seek assistance



in the civil courts, this Board does not have jurisdiction to deal with the matter under these circumstances. A case comes before us not as an independent application, but as a request by the respondent in a section 124 application for enforcement. Section 124 allows us only to deal with the “differences or allegations raised in the grievance.” That was done in the August 13th decision of the Board and in that regard, the Board is now *functus*. Being a creature of statute with no inherent powers, this Board has now no jurisdiction to compel the enforcement of the terms of its August 13th decision because no such jurisdiction is conferred by the Act. Instead, the Act spells out in section 44(11) how enforcement can be achieved. The Act also creates rights of individuals and organizations with regard to violations of the Act.

9. Having regard to these considerations, we advised the parties at the hearing that, pursuant to section 71(1) of the Board’s Rules of Procedure, we were dismissing Skyline’s application without a hearing because Skyline had been unable to establish a *prima facie* case for the remedy it seeks. However, the dismissal is without prejudice to any rights the employer and/or individual employees may have to pursue further action on the matters raised before this panel before the Board or the civil courts, should any such party so desire.

10. This decision confirms the decision communicated to the parties at the hearing.

#### **ADDENDUM BY BOARD MEMBER A. GRANT;**

1. Technically I must agree with the decision; consequently an unanimous decision issues.

2. To record my *discomfort* in so doing is to understate my position as, in my view, the union has breached the intent of an earlier award of the Board.

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**2370-84-M Spar Aerospace Limited, Employer, v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 112 UAW, Trade Union**

**Arbitration — Reference — Dispute whether request to Minister for expedited arbitration under s.45 made within time limits in collective agreement — Timeliness going to arbitrability and within sole jurisdiction of arbitrator — Minister having authority to appoint arbitrator — Board not answering question in reference not relating to Minister's authority**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

**APPEARANCES:** *John P. Sanderson, Q.C., and Dean Brennan for the employer; John H. Bettes and George Armitage for the trade union.*

**DECISION OF THE BOARD;** March 14, 1985

1. The Minister of Labour has referred to the Board the question whether the Minister has authority to appoint a single arbitrator under section 45 of the *Labour Relations Act* in circumstances hereinafter described. The reference is made pursuant to section 107(1) of the *Labour Relations Act*, which provides as follows:

107.-(1) Where a request is made under section 16, subsection 44(4) or subsection 45(1), the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

2. The affected employer and trade union were at all material times parties to a collective agreement which provided for the resolution of disputes over its interpretation, administration and application by resort to a two step grievance procedure and, thereafter, to arbitration by a sole arbitrator selected from a panel of arbitrators named in the agreement. On or about August 20, 1984, the union initiated an employee grievance at Step 1. The grievance was not resolved. It proceeded to Step 2. The employer then delivered a decision dated September 12, 1984 denying the grievance and giving certain reasons for so doing. Article 17.01 of the parties' collective agreement provides, in part:

17.01 If arbitration is to be invoked, the request for arbitration must be made in writing within five (5) working days after delivery of the decision following Step No. 2.

Although not satisfied with the employer's disposition of the grievance at Step 2, the trade union did not make a written request that the grievance be taken to arbitration under the collective agreement. Instead, on September 14, 1984, the trade union prepared a written request to the Minister of Labour asking that he refer the subject matter of the grievance to a single arbitrator to be appointed by the Minister pursuant to the provisions of section 45 of the *Labour Relations Act*. The trade union hand delivered a copy of the request to the employer the same day and then immediately mailed the original to the Ontario Ministry of Labour's Office of Arbitration, the Ministry office which customarily processes requests to the Minister for appointment of arbitrators under sections 44 and 45 of the *Labour Relations Act*. That office provides a standard form on which such requests can be made, and the trade union's request was in that form. In response to one of that form's questions, the trade union wrote

that "The time stipulated in or permitted under the collective agreement for referring the grievance to arbitration expires on the 19th day of September, 1984." The request did not arrive at the Office of Arbitration until September 21, 1984.

3. The Office of Arbitration responded to the trade union's request with a letter dated September 27, 1984. In that letter, the Director of that office said it appeared the request did not conform to the requirements of section 45(2), because it was not received within the time prescribed by the parties' collective agreement for referring the grievance to arbitration. The letter concluded:

As you will appreciate, the section confers upon the Minister the authority to appoint a single arbitrator in certain specific circumstances. On the basis of the above information, the trade union's request does not appear to conform with the requirements of the section and therefore, the Minister has directed me to advise you that he has concluded that he does not have authority to make the requested appointment.

Of course, should there be any misunderstanding as to the facts, as stated, or should you wish to present further argument concerning the application of section 45, I would be pleased to convey your request to the Minister.

This letter was copied to the employer.

4. The trade union's President replied to the Director with a letter of October 1, 1984, which read:

This is in response to your letter dated September 27, 1984 re SPAR and UAW 112, Grievance of R. Lee re Job Posting A/84-0990.

The above grievance was heard on September 5/84 and the written answer was received on September 12/84. The request for arbitration was served on SPAR on September 14/84 and mailed to your department on the same date. Therefore, it was in the mail for 7 days from Downsview before reaching your office. This cannot be deemed a deficiency on behalf of the Union, but is an unforeseen and unexpected delay beyond our control.

In the event that the above was not sufficient reason to allow the case to continue, I submit that the date of completion of STEP 2 did not take place until Sept. 18/84 due to the fact that the company changed their answer on September 18/84 (letter enclosed). As the letter points out, not a typographical error but an addition of a word that changes the context of the argument. We submit that this, in effect, is a new answer.

*I submit that the above question as to the time limits is properly the jurisdiction of the Arbitrator under 45, Subsection 4 as per the Labour Relations Act. We request that the arbitrator be appointed under section 45, Subsection 1.*

[emphasis added]

By letter dated October 30, 1984, the employer replied to a letter of October 24th from the Director. The Director's letter is not before us. In its reply, the employer took the position that its September 18th advice to the trade union of the inadvertent omission of the word "not" from a significant passage in the reasons for its September 12th Step 2 decision did not constitute a new answer to the grievance. The employer's letter took no express position on the question of timeliness.

5. The Reference before us is dated November 27, 1984. After referring to the aforementioned correspondence, it recites:



4. In the opinion of the Minister, the trade union's request and the subsequent representations have raised a question concerning his authority to appoint a single arbitrator.

5. The Minister refers to the Ontario Labour Relations Board, pursuant to section 107(1) of The Act, the question as to whether the Minister has authority to appoint a single arbitrator under section 45 of The Act.

6. Briefly stated, the question is whether or not the trade union's request is in compliance with the provisions of section 45(2) of The Act.

6. On January 21, 1985, we heard oral representations made on behalf of the trade union and employer in connection with the matters referred to us by the Minister. In a preliminary objection, the trade union's representative took exception to the question posed in paragraph 6 of the Reference. He pointed out that the representations referred to in paragraph 4 of the Reference included the union's representation that the question as to time limits was one which should be dealt with by the arbitrator appointed by the Minister. He submitted that the question of timeliness was not one which affected the authority of the Minister to appoint a single arbitrator, that the Minister had not only the authority but the obligation to appoint a single arbitrator whatever the answer might be to the question posed in paragraph 6 of the Reference, and that it would therefore be improper for the Board to consider that question. We observed at that time, without objection by counsel for the employer, that we were prepared to hear representations with respect to the question set out in paragraph 5 of the Reference even if such representations went beyond the scope of the question set out in paragraph 6 of the Reference.

7. The trade union also advised us that if we concluded that the question of timeliness of the union's request was pertinent to the question of the Minister's authority to appoint an arbitrator, then it would be necessary for us to hear evidence about the parties' past practice in interpreting and applying their collective agreements. By way of explanation, the union's representative filed a copy of a letter dated September 23, 1981, from the employer's Director of Personnel to the Director of the Office of Arbitration, captioned "Collective agreement between Spar Aerospace Limited and UAW Local 673". The trade union's representative explained that its Local 673 represents the employer's office workers. The body of the letter reads as follows:

Confirming our telephone discussion of Tuesday, September 22, 1981, although it is the Ministry's interpretation Local 673 has exceeded the five working day time limit for requesting arbitration, both Spar and Local 673 have historically used that time limit to advise the other party they will be seeking arbitration at some time in the future, to increase pressure on the parties to settle the dispute.

If the Ministry is firm in its interpretation and such interpretation would preclude an application for appointment of an arbitrator under Section 37(a) of the Act, Spar agrees to a waiver of the time limits.

The trade union's representative said the union's proposed evidence would establish that the practice referred to in this letter is also the practice of the parties to the identically worded collective agreement between the employer and Local 112. On the basis of such evidence, the trade union's representative proposed to then argue that the current collective agreement between these parties must be interpreted as permitting a grievance to be referred to arbitration at any time, so long as the opposite party has been given notice, within the five day period, that referral may be sought at some future time. The union's timely delivery to the employer of a copy of its request to the Minister, he would submit, was sufficient advice to the employer

that the union would be “seeking arbitration at some time in the future”, so that there would be no limit on the time within which this grievance could then have been referred to arbitration.

8. Counsel for the employer advised the Board it would be his submission that the Minister was obliged to consider whether a request was timely and, moreover, he was obliged to make that assessment on the basis of the language of the parties’ collective agreement alone, without reference to any alleged past practice. At the suggestion of the Board, the parties agreed that we should defer hearing any evidence with respect to alleged past practice until we had heard their argument on the following issues and determined whether any of them was dispositive:

(a) whether, as the union argued, the timeliness of a request for referral is a matter solely for the arbitrator whom the Minister is obliged to appoint in response to any request, however untimely it may appear to him to be;

(b) whether, as the employer submitted, the Minister is obliged to assess timeliness and to do so only on the basis of the contract language, without consideration of any past practice; and,

(c) whether the employer’s step 2 answer must be taken as having been given on September 18, 1984, when the employer advised the union of its “typographical error”.

9. The relevant provisions of section 45 of the *Labour Relations Act* are the following:

45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) *Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.*

[emphasis added]

10. The union's main argument was that the language of subsection 45(4) clearly obliges the Minister to appoint a single arbitrator upon receipt of a request of the sort described in subsection 45(1) without regard to the apparent timeliness of the request. Subsection 45(1) makes no reference to the timing of the request. Timeliness is the subject matter of subsections (2) and (3), neither of which makes any reference to the Minister's power of appointment. Subsection 45 (4) makes it clear that any question whether a request under subsection (1) is timely is a question that the appointed arbitrator is given *exclusive* jurisdiction to hear and determine. In the union's submission, the only question for the Minister to decide before making an appointment is whether he has received a request for appointment from someone who is party to a collective agreement entered into subsequent to the date on which section 45 first came into effect. The union further submitted that, to the extent the timeliness of the request to the Minister depends on an assessment of "that time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration", past practice is just as relevant to interpretation of the agreement's time limit as it is to any other question of interpretation of the collective agreement.

11. Counsel for the employer argued that the interpretation urged by the union requires us to ignore the language of subsection 45(2), and particularly the words "... no such request shall be made ...". Counsel submitted that before he makes the appointment contemplated by section 45, the Minister must make a number of administrative determinations, including not only a determination whether there is a collective agreement but also a determination whether the request for referral of a grievance to a single arbitrator is timely, having regard to the provisions of the collective agreement and the timing of the other steps taken by the parties in relation to the grievance. Counsel argued that the words "... stipulated in or permitted under the agreement ..." limit the Minister to considering the language of the collective agreement itself and not any collateral behaviour of the parties which might otherwise be relevant to the interpretation of the words of the collective agreement. In response to questions from the Board, counsel acknowledged that if a collective agreement expressly provided that the specified time limit for referral to arbitration could be extended by agreement of the parties, then the Minister could take into account any evidence which would establish whether or not such an agreement had been made. On the other hand, he took the position that the Minister could not take into account evidence of employer behaviour which might give rise to an estoppel and prevent the employer's reliance on the time limit if it were being asserted before an arbitrator appointed under the collective agreement. Counsel extended this principle so far as to submit that even if the parties to a collective agreement entered into an express agreement to extend the time within which a particular grievance could proceed to arbitration, the Minister could not take that agreement into account unless the collective agreement expressly contemplated agreed extensions of the stipulated time limit. Counsel acknowledged that this would result in the Minister having to reject and refuse to act on evidence which an arbitrator could receive and act on in interpreting the meaning of the same provision of the parties' collective agreement.

12. Asked what effect should be given to the words "any question as to whether the request was timely" in subsection 45(4), counsel for the employer said there were certain problems with timeliness of a request which would be within the jurisdiction of the arbitrator. He emphasized the particular language used in subsection 45(2), which provides that a request "*may* be made after certain times, but after a further time no such request *shall* be made". Counsel drew from the difference between "shall" and "may" the distinction that the arbitrator may have jurisdiction to determine whether the request was untimely because it had been made



too early, but that the Minister was to determine whether the request was untimely because it had been made too late.

13. The “timeliness” provisions of section 45 were considered by the Divisional Court in *Re Hotel, Restaurant & Cafeteria Employees Union, Local 75 and Royal York Hotel*, (1983) 42 O.R. (2d) 509, (“the *Royal York Hotel* decision”) which dealt with an application to the Divisional Court for judicial review of an arbitration award reported *sub. nom Re Canadian Pacific Hotels Ltd., (Royal York Hotel)* at (1983) 6 L.A.C. (3d) 222 (Samuels). Article 18 of the collective agreement between the parties to those proceedings provided that the union could “submit” a grievance to arbitration within ten working days from the date of the employer’s reply at Step 3 “as described in Article 19”. Article 19 required that written notification of a party’s intent to arbitrate a grievance name that party’s nominee to a tripartite board of arbitration, and that the opposite party nominate its member to the Board within ten working days thereafter. The trade union had made such a submission to arbitration, and named its nominee to the arbitration board, with respect to a particular grievance. Although that submission had been made beyond the first-mentioned ten day period, the employer had not objected to the lateness. The union and employer had then agreed to an extension of the second ten day period for nomination of the employer’s representative on the Board, in order to permit settlement discussions. Over two months later, the employer filed an application under section 45 requesting that the Minister refer the grievance to a single arbitrator. The trade union responded with a request that the Minister name a member on behalf of the employer to the tripartite board contemplated by the collective agreement. A person described in the Court’s decision as “a departmental official” advised the parties that the Minister was appointing a single arbitrator under section 45 of the Act and that it was “open to the union to raise any objection relating to the authority of the single arbitrator at the hearing”. It did. The arbitrator appointed by the Minister considered that the agreed-upon extension of time for appointment of the employer’s nominee had extended “the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration” within the meaning of subsection 45(2), and found he had jurisdiction. The Divisional Court found that the arbitrator had misinterpreted section 45. Mr. Justice Saunders had this to say (at pp 512-513):

In my opinion, the Legislature intended to provide strict time limits within which a party might make the request provided for in s. 45. In contrast to s. 44(6) of the Act which provides for extensions of time in grievance procedures there is no provision for the extension of the time-limits set out in s. 45(2). We have before us two possible interpretations of that time-limit. In my opinion, a submission to arbitration under either art. 18.6 or art. 18.19 of the collective agreement is a referral to arbitration within the meaning of s. 45(2) of the Act. It seems to me that the plain meaning of the word “referring” in the context of the legislation must be restricted to the initiation of the process by either party. The applicant invoked the arbitration process which in its normal course would continue with the appointment of a board of arbitration, the hearing and the eventual decision. Once the process was invoked by either party, it would appear to be the scheme of the legislation that each would have to abide by it until either settlement or decision. While an extension of time under art. 18 might have extended the time in s. 45(2), the extension under art. 19(2) was not part of the referral to arbitration, but was rather an extension of one of the steps in the arbitration process.

In my view the learned arbitrator was right in stating that s. 45 could not be invoked after the parties had lost the right “to go to arbitration” but he misapprehended the situation when he found that on July 2, 1982, the parties were contemplating going to arbitration.

Although the arbitrator’s award was set aside, the jurisdiction of the Minister to make the initial

appointment of that arbitrator was not questioned, nor was the jurisdiction of the arbitrator to deal with the question of the timeliness of the employer's request to the Minister.

14. The timeliness provisions of section 45 were considered by this Board on three occasions following the *Royal York Hotel* decision. In *City of Mississauga (Transit Department)*, [1984] OLRB Rep. June 844, the trade union had taken the formal step necessary to refer a grievance to arbitration under the collective agreement. Thereafter, but still within the time stipulated under that collective agreement for referring a grievance to arbitration, the employer had requested that the Minister refer the grievance to a single arbitration under section 45 of the Act. The Minister referred to the Board the question of his authority to make the requested appointment. The issue dealt with by the parties before the Board was whether an otherwise timely request by one party was untimely by virtue only of the opposite party's having earlier referred the matter to arbitration under the terms of the collective agreement. The Board concluded that one party's resort to the arbitration process contemplated by a collective agreement could not foreclose an otherwise timely resort to the provisions of section 45 of the Act. The Board considered the *Royal York Hotel* decision, and particularly the sixth and seventh sentences of the above-quoted passage from that decision. The Board noted that the employer request in that case had not been made within the time which the Court found was stipulated by the parties' collective agreement for referring a grievance to arbitration. The Court had not had before it the question whether a request for referral made within that time could be foreclosed by an earlier resort by the other party to the arbitration process contemplated by the collective agreement. The Board concluded that the Court had not intended to deal with that fact situation when it made the remarks in question, and respectfully declined to treat the Court's decision as having dealt with it. In the result, the Board advised the Minister that he did have jurisdiction to make the requested appointment.

15. A similar fact situation arose in *The Kitchener-Waterloo Catholic High School Board of Governors*, [1984] OLRB Rep. July 977. The majority in that case also concluded that a request for Ministerial referral, which had been made within the times stipulated or provided under the collective agreement for referring the grievance to arbitration, was not untimely merely because the opposite party made an earlier referral to arbitration under the provisions of that collective agreement. The Board in that case also advised the Minister that he did have jurisdiction to make an appointment in those circumstances.

16. In *St. Raphael's Nursing Home (Kitchener)*, [1984] OLRB Rep. June 859, the employer's request for a referral under section 45 was also made after the trade union had referred the grievance in question to arbitration under the terms of the collective agreement. Unlike the other two cases, the request for referral in that case had been mailed to the Minister *after* the time stipulated in the collective agreement for referring the grievance to arbitration. In the concluding paragraph of its decision on that Reference, the Board said:

9. For the foregoing reasons the Board is of the opinion that:

- (a) in light of the Court's decision in *Royal York Hotel*, *supra*, the time limits in section 45 must be strictly construed; and
- (b) the employer in this case has failed to make a timely reference under section 45 of the Act.

We therefore respectfully advise the Minister of Labour that, in our opinion, he has no authority to accede to the employer's request, and appoint an arbitrator under section 45 of the Act.

17. The Board's conclusion in *St. Raphael's Nursing Home (Kitchener)*, *supra*, makes a connection between the timeliness of the employer's request and the Minister's authority to make the appointment requested. However, it appears from the decision that the Board and the parties all dealt with the Minister's Reference on the *assumption* that the Minister's authority to make the requested appointment *was* dependant on the request being timely. It is clear that the argument made to us in this reference was not put before the Board in that one. Indeed, subsection 45(4) of the Act, the provision on which that argument rests is neither reproduced nor referred to in the Board's decision in that case. Equally, as we noted earlier, it does not appear that the Minister's authority to appoint a sole arbitrator in response to an untimely request was in any way challenged in argument before either the arbitrator or the Court in the *Royal York Hotel* case. There is no suggestion in the Court's decision that the request in that case ought to have been refused by the Minister. Indeed, it is implicit in the Court's approach that it expected arbitrators would be dealing with the questions of timeliness of the sort dealt with in its decision. This appears from the following paragraph at page 513 of report of that decision:

This is new legislation. *It is important that other arbitrators appointed under s. 45 be certain of the limits which give them jurisdiction.* It may be, as contended by the respondent, that this is not an efficacious result in terms of practical labour relations. If this is so, then statutory amendment would appear to be the only solution.

In view of our finding it is unnecessary to deal with the second ground of the application.

Accordingly, the award is set aside with cost to the applicant.

[emphasis added]

18. In short, the main issue before us has not been dealt with directly in any previous case.

19. We are persuaded that the union's interpretation of section 45 is the correct one. Subsection 45(4) gives the Minister the power to appoint. It affords him no discretion in its exercise, prescribing that he "*shall* appoint a single arbitrator" where "a request is received under subsection (1) . . ." A request "received under subsection (1)" is a request envisaged by that subsection. Subsection (1) does not address the timing of the request. It addresses only the nature of the request and the identity of the party making it. It appears to us that the Minister has no choice but to appoint a single arbitrator if he receives a request from "a party to a collective agreement" who specifically asks that the Minister refer to an arbitrator to be appointed by him a difference between the parties to that agreement "arising from the interpretation, application, administration or alleged violation of the agreement, and including any question as to whether a matter is arbitrable".

20. In coming to that conclusion we do not ignore the timeliness provisions of subsections (2) and (3) of section 45. The request for appointment must be timely; otherwise, the arbitrator will be without jurisdiction to deal with the grievance on its merits. The issue here is not whether a request must be timely; the issue is whether it is the Minister or the arbitrator who must decide whether or not the request was timely. The requirements in each of subsections (2) and (3) that "no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration" are similar to the usual sort of collective agreement limitation which those subsections incorporate by reference. Collective agreements typically provide that grievances shall not be referred to arbitration unless some



step is taken within some limited period of time after the grievance procedure is exhausted. An allegation that an arbitrator appointed under a collective agreement is without jurisdiction to consider the merits of grievance because its submission to arbitration was not made within the time stipulated by the provisions of the collective agreement is a question as to whether the matter is arbitrable. The scheme contemplated and created by the *Labour Relations Act* is that all differences between the parties to a collective agreement which relate in any way to that agreement should be determined by an arbitrator or arbitration board, *including* any preliminary question whether a grievance is arbitrable. The timeliness of a request for Ministerial referral is a question which goes to the jurisdiction of the arbitrator in the same way as other questions of arbitrability which regularly come before arbitrators appointed pursuant to the provisions of collective agreements. The Legislature cannot be presumed oblivious to the volume of arbitral litigation which collective agreement time limits have spawned before arbitrators and arbitration boards. Indeed, only four years before enacting section 45, the Legislature responded to problems which arose in that very litigation by enacting what is now subsection 44(6). Questions of timeliness, and particularly questions of timeliness measured with reference to the provisions and meaning of collective agreements, are just the sort of questions one would expect to be assigned to an arbitrator under the *Labour Relations Act*. It is not surprising, therefore, that the Legislature assigned "any question as to whether the request was timely" to the Ministerially appointed arbitrator by the express language of subsection 45(4). The only such questions which could arise are questions involving the application of subsections (2) and (3) of section 45, and we cannot accept the employer's argument that the Legislature meant to assign to arbitrators only some such questions and not others. Not only is jurisdiction to deal with all such questions assigned to the arbitrator appointed by the Minister, subsection 4 makes it quite clear that the arbitrator has the "exclusive jurisdiction" to deal with such questions. In our opinion, those words are sufficient to exclude preliminary Ministerial review of any question of timeliness which arises in conjunction with a request that he make an appointment under section 45.

21. We are reinforced in our interpretation of section 45 by consideration of the obvious purpose of that section, which is to provide each party to a collective agreement with an *expeditious* alternative to whatever arbitration process may be contemplated by that collective agreement. Subsection 45(7) requires that an arbitrator appointed by the Minister commence hearing the matters referred to him or her within twenty-one days after the *receipt* of the request by the Minister. That does not leave the Minister much time to do whatever the Legislature expected of him, and it is therefore obvious that the Legislature did not expect that he would regularly be required to entertain or resolve disputes over his jurisdiction to make an appointment. Of course, section 107 does contemplate that there may be questions as to his authority to make an appointment. For example, there could be questions of the application of the Ontario *Labour Relations Act* to the labour relations of the employer party to the collective agreement referred to in a section 45 request, having regard to the provisions of that Act itself or to the constitutional division of authority over matters involving labour relations. Such questions are rare. The Minister does have to determine whether the party making the request is a party to a collective agreement. However, a collective agreement must be in writing and signed by the parties to it: s. 1(1)(e). Each party to a collective agreement is required to file one copy with the Minister forthwith as it is made: section 83. These requirements of the *Labour Relations Act* do not leave much room for a dispute about whether or not someone is party to a collective agreement, unless the signatures themselves are challenged. There may be an issue whether an employer is bound by a collective agreement as a member of the employer association party to that agreement. This will seldom arise outside the construction industry, where expedited arbitration is available under section 124 without intervention of the Minister.

There will occasionally be a question whether an employer not signatory to a collective agreement is nevertheless bound by its terms by operation of the provisions of section 63 of the *Labour Relations Act*. A requesting union may take the position that its grievance is against an employer who is a party to a collective agreement in that sense. In such cases, examination of the collective agreement itself is not dispositive of the questions the Minister must consider under subsection 45(1). Subsection 107(2) expressly anticipates that the authority of the Minister may occasionally depend on the proper application of section 63 to a particular set of facts. It is not at all surprising that the Legislature would contemplate such an issue being referred to this Board, which regularly deals with the application of section 63, rather than by an arbitrator. Issues in arbitrations as to the identity of parties or existence of a collective agreement are rare. Questions of arbitrability arising out of alleged non-compliance with collective agreement time limits are far more common, and are regularly dealt with by arbitrators. Again, subsection 45(7) contemplates that an arbitrator will commence dealing issues, including issues of arbitrability, within twenty-one days after the request is made to the Minister. In this case it took four months for an issue of timeliness to come to a hearing before this Board. With expedition as the purpose of the legislation, the assignment of adjudication of common and familiar sorts of questions of arbitrability to arbitrators rather than to the Minister or this Board makes eminent good sense.

22. In this case it is common ground that the trade union and employer are parties to a collective agreement and that the trade union has made a request to the Minister to refer to a single arbitrator, to be appointed by the Minister, a difference between the parties to the collective agreement arising from its interpretation, application, administration or alleged violation. In those circumstances, we are of the opinion that the Minister does have the authority and, indeed, the obligation, to appoint a single arbitrator and refer to that arbitrator the difference between the parties, including any question as to whether the difference is arbitrable and any question as to whether the request to the Minister was timely.

23. We have found that one of the representations referred to in paragraph 4 of the Minister's Reference — the representation made by the trade union in the last paragraph of its letter of October 1, 1984 — is correct and determinative of the question articulated in paragraph 5 of the Reference. Paragraph 6 of the Reference poses a question which in our opinion does not relate to the Minister's authority to make an appointment. We have been concerned, however, whether we are nevertheless obliged to address that question. Read literally, section 107(1) requires us to report to the Minister the Board's decision on any question which in *his* opinion relates to his authority to make an appointment under section 45. As the Board's decision in *St. Raphael's Nursing Home (Kitchener)*, *supra*, treated timeliness as relevant to the Minister's authority to make an appointment under section 45, it is not at all surprising that the Minister would have formed the opinion in this case that timeliness was a question which might affect his authority to make the requested appointment. We are satisfied that while the Board's opinion about the timeliness of the request in *St. Raphael's Nursing Home (Kitchener)* was correct, its conclusion about the Minister's authority to make the requested appointment was incorrect, and would have been different if its attention had been directed to the argument dealt with in this decision. In that case, however, as in the two other earlier References, the only question referred to the Board was the general question posed in paragraph 5 of this Reference. The specific question posed in paragraph 6 of this Reference was not posed in the three earlier References. It was here. Does the mandatory language of section 107(1) oblige us to answer that question?

24. The Board's role on a Reference, like that of a court in similar circumstances, is advisory (see *R.v. Ontario Labour Relations Board, ex parte Kitchener Food Market Ltd.*, [1966] 2. O.R. 513 (Ont. C.A.)). The Minister is not obliged by law to follow the Board's decision. That decision is not determinative of the rights of the parties who would be affected by a Ministerial appointment, other than in the practical sense that on an issue which the Board would have jurisdiction to determine *inter partes* — the application of section 63, for example — those parties (and the Minister) could fairly expect that if the same issue arose in an application involving the same parties, the Board would respond identically to identical facts. Indeed, it is in that context that the procedure contemplated by section 107 is most efficacious. Although it may not have been intended that questions referred under section 107 be limited to issues with which the Board otherwise has jurisdiction to deal, it seems unlikely that it was intended to require the Board to answer all questions posed in a Reference, if the answer to one makes the other or others moot. Although the meaning of the language used in the Reference is not free from doubt, we conclude that paragraphs 4 and 5 of the Reference were intended to have some significance independent of paragraph 6, and that the Minister did not intend us to ignore the trade union's representation as to the arbitrator's jurisdiction. On that view, paragraph 6 is not the only question posed in the Reference. As the answer to the broader question in paragraph 5 makes it moot, we conclude it is not necessary for us to answer the question in paragraph 6. Had we concluded otherwise, we would have rescheduled this matter for hearing as, in our opinion, whoever is to assess what is "the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration" must approach the interpretation of the agreement's provisions in the same manner and on the same sort of evidence as an arbitrator would consider if a question of collective agreement interpretation had arisen in respect of his or her appointment under that agreement. On that basis, we would have heard the proposed evidence about the parties' past practice before making any decision about the timeliness of the request. Indeed, that further reinforces our interpretation of section 45: the person best equipped to approach the timeliness issue as an arbitrator would is an arbitrator.

25. We therefore respectfully advise the Minister of Labour that, in our opinion, he has the authority and obligation under subsection (4) of section 45 of the *Labour Relations Act* to act on the trade union's request and appoint a single arbitrator. It would be open to the employer to raise before the single arbitrator any objection to his or her authority arising out of the timing of the trade union's request to the Minister.

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**2405-84-U** Retail, Wholesale & Department Store Union, AFL-CIO-CLC, Complainant, v. **T. Eaton Company Limited**, Respondent

**Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — Whether insisting on separate bargaining with union negotiating committee of each location unlawful — Whether scope of unit issue pressed to impasse — Pressing inclusion of blanket prohibition against union activity on company premises unlawful — Failure to concede wages and benefits greater than paid to non-union employees not unlawful — Whether manner of negotiating and content of employer proposals indicating surface bargaining**

**BEFORE:** Ian C. Springate, Alternate Chairman, and Board Members I. M. Stamp and E. G. Theobald.

**APPEARANCES:** *J. K. A. Hayes and Patrick Macklem for the applicant; H. A. Beresford, Robert J. Atkinson and R. A. Hubert for the respondent.*

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER I. M. STAMP; March 6, 1985**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the T. Eaton Company Limited has breached several sections of the Act. The complainant trade union relies primarily on the claim that the company has violated section 15 of the Act, which provides as follows:

The parties shall meet within fifteen days from the giving of the notice (to bargain) or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

2. The company operates a nation-wide chain of department stores. Altogether it employs some 35,000 employees. Prior to the events leading up to the filing of this complaint, the only company employees represented by a trade union were a handful of stationary engineers in Toronto and British Columbia as well as employees at its store in Victoria, British Columbia who are represented by a certified employee association. This situation changed dramatically following an organizing campaign by the respondent trade union in Southern Ontario. On March 28, 1984 this Board certified the union as the bargaining agent of employees in four separate bargaining units at the company's store in Brampton. The four units involved were a full-time and a part-time unit of sales staff, as well as a full-time and a part-time unit of office staff. On April 13, 1984 the Board certified the union to represent a unit of full-time and a unit of part-time employees at the company's store in St. Catharines. Two certificates for each store were also issued to the union with respect to three company stores in Metropolitan Toronto. The three locations were the company's Shoppers' World store (where the certificates were dated May 4th), the Scarborough Town Centre store (May 7th) and the Yonge-Eglinton Store (June 8th). On July 11, 1984 the union was also certified to represent a unit of seven employees at a company warehouse store in London. In all, the union was certified to represent approximately 1,000 company employees. Although this is a large number of employees in absolute terms, they represent less than four per cent of the company's total work force.

3. On March 29, 1984 the union served the company with a notice to bargain for a collective agreement with respect to employees at its Brampton store. In April the union sent the company its opening proposals for a Brampton collective agreement. Actual negotiations

with respect to the Brampton store commenced on May 16, 1984. This was prior to the company receiving a notice to bargain from the union with respect to most of the other stores and prior to the issuance of certificates covering employees at the Yonge-Eglinton and the London warehouse stores. As will become clear, a major dispute arose between the parties concerning how bargaining should be conducted with respect to the various stores where the union held bargaining rights.

4. The chief union spokesman at negotiations with respect to the company's stores in Metropolitan Toronto and Brampton was Mr. Robert McKay, a union business agent with many years experience. Other union officials, namely Mr. Abe Player and Mr. John Fuller, were assigned to be the union's chief spokesman at the London and St. Catharines stores respectively. Mr. T. Collins, an international representative of the union, was selected to co-ordinate the bargaining at all company stores. The union did not, however, utilize only full-time union officials on its bargaining committees. Rather, at each store five bargaining unit employees (two at London) were selected to also be part of the union bargaining committee for that store.

5. The chief company spokesman was Mr. Ron Hubert, the company's employee relations manager. Prior to 1972 Mr. Hubert had been the corporate industrial relations manager at Canada Packers, where he was responsible for the negotiation and administration of some 30 collective agreements. Mr. Hubert headed up the company negotiating team at all locations except London where Mr. Barry Puckett, a member of Mr. Hubert's staff, served in this capacity. At all other locations, Mr. Hubert was joined by a member of his staff as well as two or more managers connected with the local store.

6. It is noteworthy that during the union's organizing campaign at the six stores in question, the company did not engage in any anti-union activity designed to deter employees from joining the trade union. After the union had been certified, the company on a number of occasions stated that it recognized the union's status as bargaining agent for the employees. The company responded to requests for information from the union by providing the union with lists of employees in each bargaining unit as well as each employee's classification and wage rate. The company also provided the union with information regarding company programs relating to matters such as paid time off and employee sickness and disability plans.

7. Approximately 30 negotiating sessions were held between the parties. As already noted the first of these sessions was held with respect to the Brampton store on May 16, 1984. Present for the union was its Brampton negotiating committee comprised of Mr. McKay and five store employees drawn from both the full and part-time staff. Also present was Mr. Collins, the coordinator of bargaining for the union at all six stores. Although the company took the position that since the full and part-time employees had been included in separate bargaining units by the Board they should be covered by separate collective agreements, it made no challenge to the inclusion of full and part-time employees on a single bargaining committee. To the contrary, Mr. Hubert expressly stated that the company recognized the right of the union to select who it wanted to represent it at the bargaining table.

8. Prior to the commencement of the formal negotiating session on May 16th, there was an informal meeting between Mr. Collins, Mr. McKay and Mr. Hubert. At this meeting the two union officials indicated that they desired to negotiate a single "master agreement" to cover employees in all of the certified bargaining units. Mr. Hubert's response was that the company desired to negotiate a separate collective agreement for each certified bargaining unit. In these

proceedings, Mr. Hubert testified that while at Canada Packers, he was responsible for the negotiation and administration of a master agreement covering 11 different locations. According to Mr. Hubert, the master agreement had created several difficulties for management. These included problems related to getting a negotiated agreement ratified by employees at all locations, feelings of neglect on the part of employees at the smaller establishments as well as disputes between local and national union officials relating to the administration of the agreement.

9. When the formal negotiating sessions began on May 16th, and after a number of preliminary matters had been disposed of, the parties turned to consider the union's proposal relating to employees at the Brampton store. The proposal consisted of a draft collective agreement covering non-monetary items for both full and part-time employees, as well as a summary of the union's position with respect to benefits and wages. Although the union's proposal covered both full and part-time employees, it is clear that the union expressly or by implication agreed to a company suggestion that the proposal initially be discussed only insofar as it applied to full-time employees. Discussion of matters relevant only to the part-time employees was to be left until later.

10. The draft agreement proposed by the union contained a recognition clause which would merge the full and part-time bargaining units at Brampton into one, and also expand the units so as to include management trainees who had been excluded from the units during the certification proceedings. As might be expected, the proposed agreement contained many provisions which would be regarded as favourable from a trade union's point of view. By way of example, although the Act requires an employer to agree to a union request that a collective agreement contain a provision requiring the employer to check off union dues from employee wages and remit them to the trade union, the union proposal sought to make it a condition of employment that all employees take out membership in the union. As another example, the union proposed that when selecting employees for promotions, layoffs and recalls, seniority be the governing factor, subject only to the requirement that the senior employee have the ability to competently perform the job. Such a clause would prohibit the company from selecting a junior employee who, in the company's view, was more capable than the senior employee.

11. At the negotiating session on May 16th, Mr. McKay on behalf of the union began to explain the union's proposal on a clause by clause basis. During this process, Mr. Hubert, the company spokesman, asked Mr. McKay a number of questions relating to the meaning of certain proposed clauses as well as what the union intended to achieve by them. While Mr. Hubert did not direct any argument with respect to the union's proposals, it is clear that many of his questions did indicate to the union that the company was not in agreement with its proposals. Mr. McKay testified that it seemed like Mr. Hubert had asked "500 questions". Mr. McKay further testified that Mr. Hubert's questions resulted in an extensive dialogue between himself and Mr. Hubert. The weight of the evidence, however, suggests that while Mr. Hubert did ask a large number of questions, they fell well short of the 500 mark. The evidence further suggests that what occurred could not accurately be described as an extensive dialogue. Instead, approximately 75 per cent of the talking was done by Mr. McKay.

12. A second negotiation session with respect to the Brampton store was held on June 11, 1984. On this day the union completed a review of the "language clauses" in its proposal except for those of specific concern to the part-time employees. The union did not discuss in any detail monetary matters such as wages and employee benefits. This was in line with a general practice in negotiations whereby the parties seek to first get agreement on "language clauses"



before turning their attention to monetary matters. It had been the union's expectation that once it completed explaining its own proposals, the company would immediately respond with a written proposal of its own. This did not occur. Instead, at the third Brampton negotiating session held on June 14, 1984, Mr. Hubert began to go through each of the union proposals explaining why the company could not agree to them as worded. Mr. Hubert testified that this manner of proceeding was part of the process which he had always followed in negotiations. According to Mr. Hubert, this process involves three separate phases. In the first phase the union explains its proposals, with the company asking questions to ensure it understands what the union is hoping to achieve by its proposals. During the second phase the company explains any objections it has to the union proposals with the aim of trying to convince the union that its proposals are not appropriate. The third phase involves the company tabling its own written proposals accompanied by a brief oral explanation as to the rationale behind each of them. We would note that although Mr. McKay in his testimony indicated he felt this manner of proceeding by the company was a waste of time and improper, union counsel raised no such contention. Further, given that the process of collective bargaining consists, in part, of trying to convince the other side to alter its position, we do not regard the company's general approach as having been *per se* improper.

13. After June 14th there was a delay in the Brampton negotiations caused primarily by the fact that the parties were meeting with respect to certain of the other stores. The next Brampton negotiating session was held on July 4, 1984. Prior to the commencement of the formal negotiating session, Mr. McKay indicated to Mr. Hubert that he was displeased with the speed of negotiations. Mr. McKay testified that he told Mr. Hubert that he "knew what his game was", and that if the company did not soon table a language proposal, the union negotiating committee had instructed him to apply for conciliation. According to Mr. McKay, after this Mr. Hubert seemed to "speed up" and his comments relating to the union's proposals moved "closer to positive". Further negotiating sessions were held with respect to Brampton on July 20th and September 13th. On September 13th, Mr. Hubert finished giving the company's position with respect to the union's non-monetary proposals.

14. While negotiations were underway with respect to the Brampton store, negotiating sessions were held with respect to a number of other locations where the union held bargaining rights. At these sessions, the company indicated that its intent was to go through the same three phase process as at Brampton, that is, to have the union review its proposals, the company state its views with respect to the union's proposals, and then for the company to present its own written proposals. Because the positions adopted by both parties were essentially the same at all of the stores, such a process would largely result in a repetition of what had already gone on at Brampton. Further, in that Mr. Hubert and Mr. McKay were the spokesmen for their respective sides at most locations, they would be saying essentially the same things to each other. As already noted, however, apart from Mr. McKay and Mr. Hubert, the composition of the bargaining teams for both sides varied from location to location. The company justified its desire to repeat the full bargaining process at each location on this fact. According to Mr. Hubert, the company wanted to ensure that its local managers would be familiar with the language and meaning of the clauses included in any collective agreements. A second basis for repeating the full bargaining process — one stressed by Mr. Hubert in his testimony — was that the company desired an opportunity to explain its position to each of the union negotiating committees so as to try to convince them of the correctness of the company's position.

15. Negotiations commenced at the other stores in much the same way as they had at Brampton. The union, however, soon began to object to what it regarded as a repetitious waste

of time. The union also made the point that it did not have the responsibility of educating local store managers with respect to the administration of collective agreements. At the Brampton negotiating session held on July 4, 1984, Mr. Collins advised the company that the union was not prepared to continue reviewing its proposals at the other locations since to do so would be a waste of time. At this meeting either Mr. Collins or Mr. McKay proposed that the company rely on the union officials to explain the company's position to the other union bargaining committees. Mr. Hubert rejected this proposal. Mr. Hubert testified that in his view the purpose of negotiations is to try to convince the other side to adopt your position, and that he was not prepared to rely on the union to put forward the company's position. It is of some interest that Mr. McKay testified that while he had, in fact, advised the other committees of what he had been told by the company, he admitted that he had not tried to be persuasive when doing so.

16. In early September of 1984 the union applied to the Minister of Labour for the appointment of a conciliation officer with respect to all of the certified bargaining units. The role of a conciliation officer is to try to assist the parties to negotiate a collective agreement. The appointment of a conciliation officer is also the first step towards putting the union in a legal strike position. If a conciliation officer reports to the Minister that he has been unable to assist the parties to effect a collective agreement, then pursuant to section 19 of the Act, the Minister may either appoint a conciliation board (something he very rarely does) or the Minister may advise the parties that he does not consider it advisable to appoint a conciliation board. The notice of the Minister to the parties advising them that he will not be appointing a conciliation board is generally referred to as a "no board report". Section 72 of the Act provides that fourteen days after the Minister has released a no board report, employees may commence to engage in a lawful strike. Mr. McKay for the union acknowledged in cross-examination that part of the union's motivation for applying for conciliation was to "start the clock" in terms of putting pressure on the company. It is clear from Mr. McKay's evidence that by September union officials were seriously considering the possibility of strike action during the Christmas shopping season, and that subsequently a Christmas strike became a key part of the union's negotiating strategy. Although the Brampton negotiations were ahead of those at the other stores, the union applied for conciliation at all the locations so as to ensure that all of the employees it represents would be in a position to strike at the same time.

17. The first time the parties met with a conciliation officer was on October 4, 1984 with respect to the Brampton store. At this meeting, the company presented a written proposal to the union covering non-monetary items. The proposal was not tabled all at once, but was presented on an article-by-article basis with Mr. Hubert giving a brief explanation of each of the clauses proposed by the company. The company's proposals included a bargaining unit description which would have the effect of reducing the scope of the Brampton full-time bargaining unit by excluding from the unit "seasonal employees" as well as "sales supervisors", a former classification which the company was considering re-establishing. The company also wanted to limit the unit to its one existing store in Brampton, whereas the Board had described the unit to encompass the municipal limits of the City of Brampton. This proposed change would not have any immediate impact on the parties. However, if in the future the company were to open a second store in Brampton, the employees at such a store would automatically be included in the bargaining unit on the language utilized by the Board, but excluded on the language proposed by the company.

18. The union found most of the company's proposals quite distressing. The union objected to a grievance procedure proposed by the company which would require an employee to be specific as to what he or she was grieving about and the remedy requested, but not require

the company to put its position in writing. The company also proposed strict time limits for the handling of grievances, and a provision disallowing an arbitration board from relieving against any missed time limits. The company proposed that a discharged employee be able to grieve that the discharge had been without just cause, but at the same time it sought agreement for a stipulation that for certain types of conduct, such as theft and destruction of company property, discharge was an appropriate penalty. An arbitration board reviewing a discharge based on one of these grounds would have authority to decide whether or not the employee had actually engaged in the conduct complained of, and if it decided that the employee had not, it could re-instate him. However, if the arbitration board concluded that the employee had in fact engaged in the conduct complained of, it would be without jurisdiction to substitute a lesser penalty for the discharge.

19. The company's proposals which caused the union the greatest concern related to the application of seniority to promotions, lay-offs and recalls. Whereas the union had proposed that seniority be the deciding factor, providing the most senior employee could completely perform the job in question, the company proposed that seniority be the deciding factor only if, in the company's view, other matters such as skill and ability were equal. The company's proposed clause governing promotions was particularly upsetting to the union. It provided that the company would consider employees for promotion on the following basis:

Any such employees shall be considered on the basis of their skill, ability, qualifications, performance record, potential and experience, and if an employee can satisfactorily perform the requirements of the new position, and in the company's discretion reflects the image and customer profile being attracted by the merchandise being sold, that employee shall be promoted. If two (2) or more employees are so qualified, the company shall determine the best qualified and he shall be promoted. If two (2) or more employees are equally qualified to be the employee promoted, then the company shall promote the employee among them with the longest continuous service with the company.

Mr. Hubert testified that the company desired to include this provision in a collective agreement so as to ensure that the company be able to promote people who "fit the mold" of a particular department. According to Mr. Hubert, in recent years the company has faced increased competition from specialty stores which hire employees not only on the basis of their ability to meaningfully discuss the merchandise in question, but also on whether they "fit the image" of the merchandise. Although the union describes the company proposal as "Dickensian", it does not contend that it is *per se* unlawful. We would note that the inclusion of such a provision in a collective agreement could not be used to justify the selection of employees based on criteria prohibited by the *Human Rights Code* such as sex, race or age. This comment is not meant to suggest that we view the company as likely to select employees based on such prohibited criteria, but only to indicate that the law imposes limits on how such a provision might be applied.

20. As already noted, the company's initial proposal was given to the union with a brief explanation at the first Brampton conciliation meeting held on October 4, 1984. Mr. McKay's recollection is that by the end of this meeting agreement had been reached with respect to only two collective agreement provisions, namely a clause dealing with employee health and safety, and another clause in which the company agreed to provide a bulletin board for the posting of union notices. Either at the October 4th meeting or shortly thereafter, the union indicated to the company that it regarded Brampton as the "lead store" in negotiations, and it expected that the terms of any agreement reached at Brampton would likely also be agreed to at the other stores.



21. The next conciliation meeting at Brampton was on October 18, 1984. At this meeting the union made a new proposal to the company in which it retreated from several of its earlier proposals. At one point on October 18th, Mr. Collins, the union's international representative, privately suggested to Mr. Hubert that if the company agreed to meet employee representatives from all of the stores at a common bargaining table, the union would drop its outstanding request that the parties enter into a master agreement. Mr. Hubert's response was that the company would not meet with representatives from all of the stores at a common bargaining table. Further meetings with a conciliation officer were held on November 6th and November 14th. At this latter meeting the company presented agreement language with respect to the unit of part-time retail employees. On November 5, 1984 the company, with the union's consent, had implemented a general 7.8 per cent wage increase to employees in the various bargaining units, an increase also given to employees in the Toronto area not represented by a trade union. At the conciliation meeting on November 14th, the company indicated that in its view, the unionized employees should not receive any additional increase.

22. While conciliation meetings were ongoing with respect to the Brampton store, conciliation sessions were also held at the other stores. It might be noted at this point that given the number of locations involved and the fact that Mr. Hubert and Mr. McKay were the main spokesmen for their respective sides, there were some difficulties in arranging dates for meetings. Indeed, because of vacations and Mr. Hubert's preparation for and attendance at certain Board hearings relating to the company's Eaton Centre store, only one negotiating session was held in August. The parties did, however, meet six times in September. Further, the company acceded to a union request that at least one conciliation meeting be held with respect to each of the stores during the month of October. In addition to the Brampton conciliation meetings, conciliation meetings were held on October 9th at the Scarborough Town Centre, October 12th at St. Catharines, October 17th at the Yonge and Eglinton store, October 24th in London and October 26th at the Shoppers' World store. A second conciliation meeting was held at St. Catharines on November 1st.

23. At the stores other than Brampton there was some variation as to exactly what happened during conciliation. Generally speaking, however, with respect to the union proposals that the company had already commented on, the company immediately provided the union with its proposals on the same issues. With respect to the union proposals that the company had not yet expressed its views on, Mr. Hubert briefly stated the company's view and then tabled the company's proposal on the same issue. There were some departures from this procedure, however. The most noticeable was on October 9, 1984, at the Scarborough Town Centre. At this meeting, the union not only indicated that it was not prepared to listen to the company explain its proposals on an article-by-article basis, but it advised the conciliation officer present that it wanted the Minister to issue a no board report. The union subsequently sought to stop the issuance of such a report, but to no avail. The union then requested that no board reports issue with respect to the remaining locations. By November 7, 1984 no board reports had been issued with respect to all of the stores.

24. On November 19, 1984 a meeting was held to discuss the procedure for further negotiations. This meeting was attended by representatives of the parties as well as certain officials of the Ministry of Labour. At this meeting the union proposed that one of the following procedures be adopted, namely that the company meet with all of the union's bargaining committees at one bargaining table, negotiate with the Brampton committee supplemented by one representative from each of the union's other committees, or meet only with the Brampton committee while ensuring that the Brampton committee had ready access to a representative

from each of the other committees. The union further proposed that the parties set aside one full week for collective bargaining. For his part, Mr. Hubert stated that the company would not be willing to negotiate with representatives of the different union bargaining committees at the same bargaining table, but that the company would consider the union's other proposals. In a telephone discussion the next day with Mr. V. Pathe, the Assistant Deputy Minister of Labour, Mr. Hubert agreed to set aside a week for negotiations with the union's Brampton committee. Mr. Hubert also agreed that during the week in question the company would allow a leave of absence for one person selected by the union from each of the other stores so that they would be available to consult with the Brampton committee. Mr. Hubert placed one condition on his agreement, namely that before the union took any strike action, the company would get an opportunity to meet with the full union committees at each of the stores. Mr. Pathe then contacted the union, which agreed to this condition. Both parties then set aside the week commencing November 26, 1984 for negotiations.

25. On November 22, 1984 the union delivered to the company a written proposal in which it moved off of certain of its earlier positions. It was the expectation of the union that the company would likewise be presenting a new proposal. On Monday, November 26, 1984 the company did, in fact, present the union with four written proposals, one for each of the four Brampton bargaining units, even though the two units of office staff had not yet been the subject of any negotiations. The union was disappointed that the company proposals with respect to the retail employees were not significantly different than those it had tabled earlier. The company proposal did not include any reference to employee classifications or a wage schedule. It did, however, contain a proposed clause relating to employee benefit plans, which provided that the company would continue its current benefit plans "in conformity with their general application throughout the company".

26. At the negotiating session on November 26, 1984 the union posed a number of questions to the company. One was whether the company's most recent proposal was its "final position". Mr. Hubert commenced his response by saying that the term "final position" was a dangerous one to use. He went on to state that while he would not say that the company might not change a sentence, a paragraph or a comma in its proposal, he did not want to mislead the union into thinking there was room for significant change. The union then asked whether the company was prepared to put employee classifications and wages in a collective agreement. This appears to have been the first time that this issue was specifically raised with the company. Mr. Hubert repeated the company position that it was not prepared to go beyond the 7.8 per cent wage increase it had already implemented, but he did not state one way or the other whether the company was prepared to include wages and classifications in a collective agreement. Mr. McKay testified that from Mr. Hubert's comments the union concluded that the company was not prepared to do so.

27. Following the above exchange, the union decided to immediately break off negotiations and prepare for strike action. According to Mr. McKay, the union made this decision because it felt that to date virtually nothing had been accomplished and that to continue to negotiate for the remainder of the week would not likely accomplish anything. The union also decided that the company would not get an opportunity to meet with each of the full union bargaining committees before any strike action was undertaken, as the union had previously agreed to. Mr. McKay testified that since the company had not made any substantial changes in its bargaining position, the union decided that it was not necessary for the company to meet with the other committees.

28. At the point where negotiations broke off on November 26, 1984, the parties had reached agreement on a number of collective agreement clauses. These included a "no discrimination" clause in which the company and the union agreed that there would be no discrimination against any employee because of membership or non-membership in the union. This clause reflected the fact that the union had dropped its proposal that all employees be required to become union members as a condition of employment. The parties had also reached agreement on a procedure whereby dues would be deducted from employee wages and forwarded to the union, although still outstanding was a question relating to who the dues should be sent to. How this issue arose, will be dealt with in some detail later in this decision. As of November 26, 1984, agreement had also been reached on collective agreement clauses relating to the role of union stewards, the procedures to be followed by employees unable to attend work, payment for overtime work, meal allowances, bulletin boards and health and safety. Partial agreement had been reached on clauses respecting commission plans, employee leaves of absence and a grievance procedure. The parties were, however, still apart on a substantial number of issues. Although the union had dropped its proposal that the scope of its bargaining rights at Brampton be expanded beyond those granted in the Board's certificates, still outstanding were company proposals that would reduce the scope of the units. The parties also remained at odds on the manner by which employees would be selected for layoffs, recalls and promotions. The union continued to seek improvements in employee benefits, whereas the company had not moved off of its proposed clause which would ensure only that unionized employees continued to receive the same benefits as other employees. As of November 26th, the parties had spent very little time discussing wages, although as already noted the company had stated that it was not prepared to increase wages beyond the 7.8 per cent increase already implemented. Still unclear was the issue of whether the company was prepared to put wage levels into a collective agreement.

29. The union commenced strike action at all six stores on November 30, 1984. Subsequent to the commencement of the strike, and while hearings into this complaint were underway, the parties had several meetings with the Director of the Ministry of Labour's Conciliation and Mediation Services. One such meeting was held on January 2, 1985. At this meeting, the parties discussed the company's proposal to amend the scope of the various bargaining units, a matter not discussed on November 26th. On January 2nd the union indicated that while it was prepared to consider possible accommodations with respect to the business centre at the Scarborough store, it was not prepared to depart from the unit descriptions set out in any of the Board certificates. Later on the same day, the company provided the union with a letter indicating that, except for the business centre at Scarborough, it was prepared to follow the bargaining unit descriptions contained in the Board certificates. The company also asked the union for its position with respect to the Scarborough business centre. Mr. Hubert testified that from the outset the company had recognized that it could not bargain to impasse over the issue of the bargaining unit descriptions, and that given the large number of items still in dispute, the company was of the view that it had not done so. According to Mr. Hubert, it was only on January 2nd that the union made it clear that with the possible exception of Scarborough, it was not prepared to consider changing the bargaining units from those described in the Board's certificates.

30. At a negotiating session held on January 7, 1985, the company presented the union with a written proposal which would have the effect of including employee classifications and wages in a collective agreement. This appears to have been the first time that wages were dealt with by the parties subsequent to the breaking off of negotiations on November 26th. Another event of some interest occurred during the negotiation meetings in January. Although the



negotiations continued to be with respect to the Brampton store, the union sent to the bargaining table its original Brampton bargaining committee, supplemented by employees who were also on the other union bargaining committees. When advised ahead of time of the union's intention to adopt this procedure, Mr. Hubert's only response was that the company could not dictate to the union who it could send to the bargaining table.

31. It had been the union's expectation that a strike over the Christmas sales season would prompt the company to alter its bargaining position, but such did not occur. The company has continued to operate the struck stores. Mr. Hubert testified that the company is prepared to sign collective agreements with the union, but only on terms acceptable to the company. Mr. Hubert readily acknowledged that these terms would leave the company with most of its current managerial prerogatives intact and not give the unionized employees better wages or benefits than those received by other employees. Mr. Hubert testified that, in the company's view, the wages and benefits now being received by its employees are competitive and quite appropriate, and that from the outset of negotiations one of the company's objectives had been not to agree to better conditions of employment for the unionized employees.

32. Mr. Hubert's comments concerning how the company viewed its current wages and benefits were made during his examination in chief. At the very conclusion of his examination in chief, Mr. Hubert made the comment that the company felt that to improve the benefits and wages of employees in the organized stores would simply encourage employees in other stores to organize. In cross-examination union counsel asked Mr. Hubert about this comment and also closely questioned him as to whether the company's refusal to agree to higher wages and benefits for its unionized employees was related to a desire to discourage other employees from joining a union. Mr. Hubert flatly denied that this was the company's motivation. According to Mr. Hubert, the company was concerned about the possible impact on non-unionized employees of agreeing to give unionized employees superior conditions of employment, and as to how such a situation could be explained to the non-unionized employees. Mr. Hubert readily agreed with the suggestion of union counsel that the company would prefer to operate union free, but he rejected the suggestion that the company's bargaining stance was designed to produce such a result. According to Mr. Hubert, the company views its current conditions of employment as fair and competitive and does not believe it appropriate to improve on them simply because some of its employees have joined a trade union.

33. As noted above, section 15 of the Act requires that following the certification of a trade union the parties "shall bargain in good faith and make every reasonable effort to make a collective agreement". The Board regards the section 15 duty to bargain in good faith as having at least two major functions. The first is to reinforce an employer's obligation to recognize the trade union as the lawfully selected bargaining agent of employees. To this end, the section requires an employer to negotiate with the bargaining team selected by the trade union. The employer cannot seek to determine the structure and composition of the union's bargaining team. See: *High Times Publication Ltd.*, [1984] OLRB Rep. Oct. 1448. The Board has also concluded that the section prohibits an employer from attempting to by-pass the union and bargain directly with employees. See: *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393.

34. The second major function of the section 15 duty is to oblige the parties to enter into serious negotiations with the shared intent of entering into a collective agreement. This requires that the parties explain their positions to the other side, so as to allow for rational, informed discussions. See: *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199. It also requires that

an employer be prepared to enter into a collective agreement. An employer cannot enter into negotiations with the intent of ridding itself of the trade union. Neither can it simply engage in "surface bargaining", whereby it "goes through the motions" of bargaining without any real intent of signing a collective agreement. See: *Radio Shack*, [1979] OLRB Rep. Dec. 1220. Section 15 does not, however, require that an employer agree to the terms of a collective agreement proposed by a trade union. Neither does it prohibit an employer acting in its own self-interest from engaging in "hard bargaining" so as to obtain an agreement with terms favourable to it. We would refer in this regard to the following excerpt from *C.C.H. Canadian Limited*, [1974] OLRB Rep. June 375, where the Board commented:

There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (See *Regina ex. rel. Hearn v. Norfolk General Hospital* [1957] 119 C.C.C. 290 (Ont. Mag. Ct.). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.

Reference might also be usefully made to the following excerpt from the *Journal Publishing Company of Ottawa Limited* case, [1977] OLRB Rep. Nov. 748:

The duty to bargain in good faith is administered by this Board in such a way as to improve and facilitate the practice and procedure of collective bargaining. This approach recognizes, however, that the results of collective bargaining are necessarily dictated by the relative economic strength of the bargaining parties. Although the Board should make every effort to restore a bargaining relationship and re-establish the dialogue between the parties to that relationship, it should not go so far as to redress any imbalance of bargaining power that might exist in a particular bargaining situation.

35. The union contention that the company violated section 15 of the Act relies on the manner in which the company carried on negotiations, the content of certain of the company's proposals, the motivation behind those proposals, as well as the cumulative effect of all of these. It is the union's position that when the company's conduct is viewed in its entirety, it demonstrates that throughout the company was engaged in "surface bargaining" and that it had no intent of concluding a collective agreement.

36. The union contends that the structure of bargaining insisted by the company involved a violation of section 15. The union put its position as follows:

It is submitted that the process, adopted and insisted upon by the respondent, requiring substantially identical bargaining sessions at each of six locations followed by further meetings for each unit (totalling fourteen) at those six locations, is indicative of an intent to frustrate and/or unlawfully prolong the reaching of an agreement. Having regard to the appointment of only one chief spokesperson by the respondent for the five major locations, covering all but seven employees affected, his other additional continuing national responsibilities, and his admission that the collective bargaining process would be more prolonged at Eatons than at the Canada Packers/OTEU negotiations (8-10 meetings over 6-7 months for only 13 employees in one unit), such a process was patently and predictably implausible. Such a process would have required, conservatively, more than double the number of meetings (29) which were scheduled prior to impasse on November 26, 1984. The evidence of the respondent is that as many meetings as could

reasonably be scheduled were in fact scheduled during the May — November period in 1984.

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More generally, it is our submission on this point that the position of the respondent confuses process with result. The employer may be permitted, under the law as presently understood, to insist upon concluding separate agreements for individual certified units. We submit, however, that it is quite a different matter to assert that such a result must inevitably require simultaneous, repetitive bargaining when that process itself is impossible to complete reasonably expeditiously and indeed operates to defeat a positive, expeditious outcome. To the contrary, we submit that the duty imposes both a good faith (subjective) and procedural (objective) obligation upon the parties to fashion a structure for collective bargaining consistent with the situation at hand. "Master bargaining" therefore may be a phrase which relates both to outcome and process. It may be impermissible for a company or trade union to insist upon the former: that is, that the outcome be a master agreement covering numerous units of several disparate locations. In our submission, however, it must be unlawful to resist some reasonable form of the latter — some form of master bargaining as process — where circumstances reasonably require it. This is particularly so where there have been advanced no supportable reasons to justify repetitive bargaining on an individual basis by the same spokespersons on behalf of the same principals which was the alternative process insisted upon by the respondent in this case.

37. We have no difficulty with the general proposition that an employer is not entitled to insist on a bargaining process that results in time-consuming, repetitive discussion which can serve no useful purpose. Here, however, there appears to have been a rational purpose behind the company's approach to negotiations. This arises from the fact that there was not just one union bargaining committee representing the union at all six stores, but six differently constituted bargaining committees, one for each store. Given that the company was legally entitled to bargain separate collective agreements for each store, and that one purpose of the bargaining process is to try to persuade the other party to agree to your position, we see nothing improper about the company's attempt to be able to put its position directly to each of the union's six different bargaining committees.

38. Closely related to this issue is the union's contention that the company was in violation of sections 15 and 64 of the Act because of a refusal to let union officials put the company's position as expressed at the Brampton negotiations to employees on the other union negotiating committees. Section 64 prohibits an employer from interfering with the administration of a trade union or the representation of employees by a trade union. Union counsel expressed the union's position as follows:

It is submitted that one of the respondent's explanation for its insistence upon the aforementioned process — its desire to put its case directly to the employees and its desire not to "put [its] lot in life in the hands of the business agent" of the trade union — also is inadequate; it is submitted that the failure to recognize representatives of the trade union speaking authoritatively on behalf of employees is a refusal to accept the trade union as the lawful bargaining agent of those employees and is itself a violation of sections 15 and 64 of the Act.

It is one thing to speak directly to employees who the employer meets naturally across the bargaining table. It is quite another to insist upon a redundant process with the objective only of dealing directly with rank and file employees — over the objections of representatives of the bargaining agent who have indicated that this exchange is unwanted by both the trade union and the employees.

As indicated above, the Board has adopted the view that section 15 requires an employer to



negotiate with the bargaining team selected by the trade union, and not directly with employees. In the instant case, however, at no time did the company seek to negotiate directly with rank and file employees. What the company did seek to do was negotiate with the employees and the union business agent who comprised the union's negotiating committee at each of the stores. Its actions in doing so, in our view, cannot reasonably be characterized as the type of conduct which would amount to a breach of either section 15 or section 64.

39. The union takes the position that the company breached section 15 of the Act in connection with the delays in the negotiation process — delays which it contends were caused in part by the fact that Mr. Hubert was the chief company spokesman at all the stores except London. Union counsel put the issue in the following terms:

In our submission, further evidence of an intention to frustrate or unlawfully delay the reaching of an agreement lies in the respondent's failure to meet from the end of July until August 28, 1984 despite written protests from the trade union (Exhibits 9 & 10). It is no defense to such a complaint to plead that the one available spokesperson, for all locations but one, is committed to unfair labor practice proceedings which did not commence until August 23, 1984. Further, it is no answer to claim that the respondent's representative was overextended. There is an objective requirement imposed by the duty that representatives make themselves reasonably available for collective bargaining or arrange for someone who can.

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It is further submitted that an intent to frustrate agreement is also evidenced by the fact that the employer only submitted its first counter proposal nearly five months after the commencement of bargaining, after the union announced it was going to apply for conciliation, despite repeated previous requests that it do so.

40. We have no doubt but that section 15 requires that each side's representatives make themselves reasonably available for negotiations. In the instant case there was a delay in negotiations between July 30th and August 28th, apparently caused primarily by vacations and the time spent by Mr. Hubert in preparing for and attending at certain proceedings before another panel of the Board relating to the company's Toronto Eaton Centre store. It is noteworthy, however, that prior to the instant complaint being filed, the parties had met on May 16, June 11, 14, 20, 22, 25 and 28, July 4, 19, 20, 26, 27 and 30, August 28, September 10, 13, 20 and 21, October 4, 9, 12, 17, 18, 24 and 26, November 1, 6, 14, 19 and 26. All of these dates, with the possible exception of November 19th when the parties met with officials of the Ministry of Labour, were agreed to between the company and the union. On July 25, 1984 the union did send a letter to Mr. Hubert (Exhibit #9) complaining about delays in negotiations. The letter did not, however, make any direct reference to the month of August but rather voiced a general concern with the timing problems related to conducting six different sets of negotiations. The letter again proposed that the parties bargain towards a single master agreement. (Exhibit #10 was Mr. Hubert's response.) In a letter to the company dated August 20, 1984 Mr. Collins did raise the fact that no meetings were held with respect to the Brampton store in August. (The August 28th negotiations were with respect to the Shoppers' World store.) Mr. Collins indicated that while delays in negotiations up to that point had been tolerated by the union, it would do so no longer. Thereafter negotiating sessions were held in fairly rapid succession until the union broke off negotiations on November 26th. Given these circumstances and particularly the large number of meetings that were held, we do not believe that the fact that only one meeting was held in August involved a breach of section 15. Before leaving this matter we would note that the union may well have been in a position to require that negotiating sessions with respect to *each* of the stores be held at reasonably frequent intervals, even if it

meant that the parties required different spokespersons at the various sets of negotiations. The union did not, however, insist upon this type of procedure, in part no doubt because Mr. McKay was serving as chief union spokesman at the three Toronto stores and at Brampton.

41. With respect to the actual content of the company's proposals, the union contends that they indicate that the company was engaged only in surface bargaining:

It is therefore submitted that the proposals tabled by the employer are patently unreasonable and/or significantly devoid of business justification and thus support the inference of an attempt to frustrate agreement through surface bargaining, in violation of section 15 of the Act.

In the alternative . . . it is submitted that the company's rigid insistence upon such proposals and its refusal to offer any concessions of value or reasonable alternatives or explanations, support an inference or an intent to frustrate agreement, in violation of section 15 of the Act.

42. These contentions raise the important issue of whether the company is seeking through surface bargaining to frustrate the bargaining process, or whether it is simply engaging in hard bargaining. While we have no doubt that the company would rather not have to deal with the union, on the evidence there is no question in our mind but that the company is in fact prepared to sign collective agreements with the union. The company is seeking, however, to ensure that any such collective agreements contain terms favourable to the company, terms which will retain for management most of the flexibility it currently enjoys and which will not result in any increase in operating costs. The fact that the company has not made any major concessions in bargaining relates directly to the type of agreement management is seeking to negotiate. Section 15 does not, however, preclude a party from taking a firm position in bargaining. This point is made clear in the following excerpt from *The Daily Times* case, [1978] OLRB Rep. July 604, where the Board noted:

The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses.

In the instant case, the company has taken firm positions in an attempt to secure favourable collective agreement terms. The mere fact that it has refused to make concessions acceptable to the union, does not, in our view, result in a conclusion that it is in violation of section 15 of the Act.

43. We turn now to the issue of whether certain specific company proposals were in violation of the Act. The union complains about the lack of wage schedules and job classifications in the company's written proposals prior to January 7, 1985. It will be recalled that the parties had initially concentrated their attention on non-monetary items, and that the issue of wages had received only scant mention in bargaining, except for an indication by the company that it did not intend to give employees a wage increase beyond the 7.8 per cent increase that it had already implemented. The evidence strongly suggests that the union's decision to break off negotiations on November 26, 1984 and engage in strike activity was not based primarily on the issue of wages, but rather was motivated by a failure to reach agreement on the non-monetary issues that the parties had spent considerable time in discussing, as well as the union's view that it would be best to call a strike during the Christmas shopping season. Given that the Act in section 1(1)(c) defines a collective agreement as an agreement "... containing provisions respecting terms or conditions of employment . . ." as well as the importance of wages

as a condition of employment, it is our view that except in the most exceptional of cases, an employer must be prepared to include employee wage levels in a collective agreement. The fact that Mr. Hubert on November 26, 1984 did not clearly state that the company was prepared to do so causes us some concern. However, given that the next time the issue of wages was raised the company did present a written proposal which would include employee classifications and matching wage rates in the collective agreement, we are, on balance, not satisfied that a breach of section 15 has been made out.

44. The union further submits that the manner in which the company dealt with the issue of remitting dues to the union involved a violation of section 15 of the Act in that it demonstrated both a refusal to recognize the union and an intent to frustrate agreement. It will be recalled that the company had agreed, as it was required to do pursuant to section 43 of the Act, to a collective agreement provision whereby it would deduct union dues from employee wages and remit them to the union. The company and the union had further agreed that the dues remittance cheques should be made payable to the union. The company, however, indicated they wanted to know who to address the envelope containing the cheques to. On November 6, 1984, the company proposed that the envelope be addressed to the union's financial secretary. Mr. McKay, however, indicated that it should instead be sent to the union's "local director". At the next meeting between the parties on November 14th, Mr. Hubert raised a question as to whether the "local director" was a local director for the International Union, or the director of a local. Mr. Collins, who had not been in attendance at the November 6th meeting, asked where the term "local director" had come from. When Mr. McKay indicated it had been his idea, Mr. Collins expressed the opinion that the union had better take another look at the matter. The matter was not discussed again until the parties met on January 7, 1985, at which time Mr. Hubert asked who the envelopes containing dues remittance cheques should be addressed to. The union's only response was that the identity of the local union director was none of his concern. Mr. Hubert then stated that since the union would not answer his question, the company would simply address the envelope to the union at large without naming anyone. Given the way this entire issue developed, and was resolved, we do not believe that it indicated a refusal on the part of the company to recognize the union or an attempt to frustrate the conclusion of a collective agreement. Rather, the issue appears to have arisen only because of some confusion (including confusion in the union's ranks) about how the company should address envelopes containing dues remittance cheques, and nothing more sinister should be read into the matter.

45. The union also complains about a company proposal that any collective agreement contain the following provision:

The Union agrees that there will be no Union activity of any kind or solicitation for membership on Company premises except as specifically provided for in this agreement.

The company contends that this proposal is necessary to prevent disruption of its retail operations. It is noteworthy, however, that the proposal is worded so widely that it would prohibit employees before and after work or on their breaks from approaching other employees away from the selling floor with respect to joining the union. This proposal takes on increased importance due to the fact that the union has dropped its original request that union membership be made a condition of employment.

46. The union contends that section 3 of the Act, which provides that every person is free to join a trade union and to participate in its lawful activities, guarantees employees the right during their non-working hours to solicit other employees at the work place to become members



of the union. The cases indicate that employer no-solicitation rules which prohibit employees from soliciting union membership on company property during their non-working time are presumptively to be regarded as an unlawful impediment to employee self-organization, unless special circumstances make the rule necessary in order to maintain production or discipline. This issue was discussed at some length by the Board in *The Adams Mine, Cliffs of Canada Ltd.*, case, [1982] OLRB Rep. Dec. 1767:

18. The workplace is therefore the most effective location for "union activity" to be carried out. A policy denying this forum to employees would obviously impair the effective exercise of statutory rights particularly the right of self-organization. On the other hand, company premises constitute private property and are established for the primary and important purpose of carrying on business activity. The above sections give some indication how the statute has attempted to balance these legitimate interests. Two lawful activities clearly contemplated within the scope of section 3 are the organization of a trade union and collective bargaining. See *Jarvis v. Associated Medical Services Inc.* (1961), 61 CLLC ¶16,218 at p. 980. Section 64 provides that no employer and no person (reading selectively) shall interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union. Similarly, section 66(c) prevents an employer, among others, from seeking, by any kind of threat or by imposition of any kind of penalty or by any other means, to compel an employee to cease to exercise any other rights under this Act. An employer who prevents his employees from attempting to organize a trade union while they are on company premises by a broadly drafted no-solicitation rule backed by disciplinary action runs the risk of violating these sections. See *Jarvis v. Associated Medical Services*, *supra*, page 980; *Audio Transformer Company Limited*, [1969] OLRB Rep. Nov. 994 at 1002. This, of course, does not mean an employer is deprived by the Act of maintaining productivity or discipline or of securing his property from encroachment by strangers with whom he has no relationship. Section 71 makes it clear that no person is authorized by the Act "to attempt at the place at which an employee works to persuade him *during his working hours* to become or refrain from becoming or continuing to be a member of a trade union". [our emphasis] The purpose of this section is to afford an employer an answer to the charge that he has interfered with a person's rights under section 3 of the Act by preventing that person from attempting to solicit an employee during working hours. The section recognizes the employer's bona fide interest in maintaining an efficient business enterprise and the fundamental obligation of employees to work in return for compensation. But section 71 does not speak to activities outside of an employee's working hours while on his employer's premises. Labour boards have consistently interpreted the phrase "working hours" to refer only to the period of time during which an employee is required to undertake his duties and responsibilities. Therefore the section does not apply to those periods of time an employee is on company property before shift, during coffee break, during lunch break, or after shift. This is so even if the employee is being paid for such time, otherwise an employer could prevent the exercise of statutory activity by the simple expedient of a money payment. The approach of the statute and this Board has been to create a meaningful balance between the statutory rights of employees and the proprietary and commercial interests of employers. See *Jarvis v. Associated Medical Services Inc.*, *supra*; *Audio Transformer Company Limited*, *supra*; *Jim Pattison Industries Limited*, [1979] 2 Can. LRBR 517 at 520-21; *Cominco Limited*, [1981] 3 Can. LRBR 499 at 503-504. See Notes, *Reversal of N.L.R.B. Policy Regarding No-Solicitation Rules* (1982), 34 Baylor L. Rev. 143 at 148. Because the workplace is a most appropriate theatre for membership solicitation, it has been considered reasonable and fair to construe break and lunch periods as non-working time belonging to employees to use as they see fit so long as they do not engage in disorderly conduct or adversely affect other legitimate business interests of the employer. Where they decide to use this time to engage in protected trade union activity, this statute and the remedies available under it apply. To this extent, property rights have been encroached upon by the statute. And while this is a factual issue in any particular case, union solicitation during non-working time will not generally interfere with the employer's legitimate management interests. Any interference must be real and constitute more than a minor annoyance or inconvenience.

Reference can also meaningfully be made to the decision of the British Columbia Labour Relations Board in *Cominco Ltd.*, [1981] 3 Can. LRBR 499 where the Board concluded that to the extent a provision in a collective agreement limited the right of employees to engage in organizing activities during non-working hours on the employer's premises, the provision was in violation of a section of the British Columbia Labour Code similar to section 3 of the Ontario statute. Of some relevance also is the decision of the National Labour Relations Board in *Meier & Frank Co. Inc.* 26 LRRM 1081 which held that a rule which prohibits union solicitation by employees away from a store's selling floors before and after work and during luncheon and rest periods, did not bear a reasonable relationship to the efficient operations of the store's business, and hence constituted an unwarranted interference with employee rights.

47. The cases indicate that unless the company can establish special circumstances to justify a different result, its employees have a statutory right to engage in self-organizing activity on the company's premises outside of their working hours. In the instant case, the company did not advance any such special circumstances, except for a concern about the possible disruption of its retail operations. While this concern may well justify a provision prohibiting employees from approaching each other about union membership on the sales floor, even on their own time, it would not justify a blanket prohibition against union solicitation by employees off the sales floor before and after work and during luncheon and rest periods. Nevertheless, the company continues to press the union to agree to a collective agreement provision which would have this result. We view it as improper and a breach of section 15 for the company to attempt to use its bargaining power to achieve such a result. Accordingly, the company is directed to amend its proposal so as to make it clear that it is not seeking to require the union to agree to a collective agreement provision which contains a blanket prohibition against employees approaching each other to solicit union membership away from the sales floor before and after work and during luncheon and rest periods.

48. The union contends that the company's proposal which would amend the scope of the Brampton bargaining units involved a violation of section 15 of the Act. It will be recalled that with respect to the Brampton store the union originally sought to expand, and the company to contract, the scope of the bargaining units. The same appears to have been true at certain of the other locations. On or about October 15, 1984 the union advised the company that it was no longer seeking to expand the scope of the bargaining units. The evidence does not clearly indicate one way or the other as to whether after this date, but prior to the strike, the parties actually discussed the matter. It is clear that the issue was not discussed on November 26, 1984, the date the union broke off negotiations. Indications are that after the commencement of the strike the matter was first discussed at the mediation session held on January 2, 1985. At this session, the union indicated that while it was willing to look at possible accommodations with respect to the Scarborough business centre, it was not prepared to depart from the unit descriptions set out in the Board certificates. Later that same day the company handed the union a note indicating that it was prepared to abide by the units described in the Board's certificates. With respect to the Scarborough business centre, the company requested that the union give a response to the company's proposal that the business centre be excluded from the Scarborough bargaining units.

49. Although parties are free to discuss and agree upon changes to bargaining unit descriptions set by the Board, it is not an issue that can become the subject matter of a strike. In the *Carpenters Employer Bargaining Agency* case, [1978] OLRB Rep. Aug. 776, the Board commented on the matter as follows:

... Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, must be removed from the bargaining table once a strike or lockout is imminent, or in progress. If such demands are not removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith.

In the instant case the company was not entitled to press its proposals with respect to the description of the bargaining units to impasse. However, it is far from clear that it did so. The issue of the bargaining unit descriptions was not discussed immediately prior to the commencement of the strike. The first time the matter was discussed after the strike began was on January 2, 1985, and on that date the company indicated it was prepared to abide by the unit descriptions contained in the Board certificates. In light of these developments, we do not believe that the company's conduct can properly be characterized as having been in violation of section 15.

50. The final contention raised by the trade union relates to the company's refusal to offer its unionized employees wages and benefits any greater than those currently being received by non-union employees. It is the union's contention that the company's refusal is motivated by a desire to discourage other employees from joining trade unions and as such breaches both sections 15 and 64 of the Act. The union expressed its position as follows:

Finally, it is our submission that the respondent's negotiating position that it was and is not prepared to grant organized employees better working conditions than unorganized employees in the company because it would encourage the latter to form trade unions and participate in collective bargaining has a chilling effect on and interferes with the exercise of section 3 rights, chills contemporaneous and future organizational activity by the complainant and other trade unions, and interferes with the representational rights of the complainant. As such, it is submitted that the aforementioned position is contrary to both the fundamental purpose and sections 15 and 64 of the Act.

As previously indicated, the legislative intent behind the Act, as stated in its preamble, is to "further harmonious relations between employers and employees by *encouraging* the practice and procedure of collective bargaining" (emphasis added). The proposition that an employer can adopt a negotiating position at the bargaining table either designed or informed, in whole or in part, by a desire to frustrate, inhibit or interfere with the formation of trade unions, in our submission, is clearly counter to sections 15 and 64 of the Act.

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To take the position that a wage proposal is fair or reasonable in the opinion of the employer is one thing. To adopt that position having regard to the potential of future organization by its employees is quite another, and in our submission, unlawful. We submit further that, particularly in view of the very detailed bargaining preparation engaged in by the respondent, the evidence of the respondent's witness that this consideration (impact of parity on future organizing) was not in his mind from the outset and was not a firm operating principle, is simply not credible. We invite the Board to draw the conclusion that the respondent had unlawfully determined under no circumstances to grant to unionized employees wages, benefits, or terms and conditions of employment superior to those it was prepared to grant to unorganized employees. It is submitted that this rigidity, apart from any other reason, makes the result in *Canada Trustco* inapplicable.

51. Mr. Hubert denied that the company's goal was to discourage other employees from joining a trade union. He testified that the company regarded the current level of benefits and wages as fair and competitive, although he also admitted that the company was concerned about what the impact would be on other employees if the company were to agree to better terms for its unionized employees. Nothing in the *Labour Relations Act* requires an employer to agree



to wages and employee benefits for unionized employees that are superior to those being received by non-unionized employees. See: *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356. Neither is there any provision which prohibits an employer when formulating its bargaining position to take into account the likelihood that improvements in the terms of employment for one group of employees will likely impact on other groups. Indeed, logic suggests that this is a consideration frequently taken into account by employers, since an improvement in the employment conditions of one group of employees will logically lead to calls for similar improvements from other employees of the same employer, whether they be unorganized or included in a different bargaining unit. Further, the fact that an employer refuses to give more to unionized employees, does not, by itself, necessarily mean that the employer is seeking to interfere with the formation of trade unions. Such a conclusion might be justified if the terms being offered to organized employees were inferior to those being enjoyed by comparable non-union employees, for this would indicate an intent to punish employees because they had selected trade union representation. Such, however, is not the case here. In our view, the facts of this case fall short of demonstrating that the company position on wages and benefits is in violation of the Act.

52. In summary, we are satisfied that the company has violated section 15 of the Act by insisting on a collective agreement provision containing a blanket prohibition against employees soliciting each other with respect to union membership on company premises, but away from the sales floor, before and after work and during luncheon and rest periods. The company is to amend its proposal accordingly. We have found no other specific breach of the Act on the part of the company. Further, we are not satisfied that the company conduct when viewed as a whole demonstrates any additional violations of the Act. We would stress, however, this conclusion is not meant to reflect on the “fairness” or otherwise of the bargaining position adopted by the company. Section 15 of the Act provides a legal standard against which the Board is to measure the bargaining conduct of parties, it does not set out a moral standard. Moreover, the Act does not give the Board a general authority to decide the contents of collective agreements. That is a matter left to the parties. On the evidence we are satisfied that the company is prepared to enter into collective agreements with the union, although those collective agreements would preserve to management many of the rights it now possesses and would not give to unionized employees any greater benefits or wages than those currently enjoyed by unorganized employees. For its part, the union is not prepared to agree to the terms proposed by the company, but instead seeks to obtain better conditions of employment for the employees it represents. If a settlement is to be reached, it will be because one or both of the parties re-appraise their positions in light of the importance they give to their objectives, and the economic costs they are able to inflict on one another.

53. Given all that has occurred to date, we believe it would be useful for the parties to meet with a Ministry of Labour mediator to assess whether they might now be able to agree on the terms for their collective agreements. To this end, the Registrar will forward a copy of this decision to the Director of the Ministry of Labour’s Conciliation and Mediation Services. The Director is requested to invite the parties to meet with himself, or with someone from his office, for the purpose outlined above.

#### **DECISION OF BOARD MEMBER E. G. THEOBALD;**

1. I dissent from the majority decision for the following reasons.

2. There are serious problems relating to the majority's presentation of relevant facts and to its application of legal principles. In respect to factual determinations, very significant evidence has been unjustifiably minimized. I am also concerned that the majority places a gloss on certain facts which unjustifiably undermines the thrust of the union's complaint to the obvious benefit of the respondent. When one re-evaluates a number of these factual issues it is apparent that the union has a very strong claim for a finding that Eaton's has engaged in surface bargaining. In respect to the majority's legal conclusions, the legal analysis avoids the union's allegation that surface bargaining has occurred. Each of the union's allegations, raised to support a surface bargaining finding, is assessed independently, with no serious effort being made to review the *totality* of Eaton's collective bargaining conduct. At best, one finds in paragraph 52 a single sentence which states that the totality of Eaton's conduct does not constitute any additional violation of the Act. This is a conclusion totally unsupported by legal analysis and certainly questionable in light of both the majority's determination that at least one breach of section 15 occurred and the concerns that it expressed on other issues such as Eaton's prolonged unwillingness to include wages and job classifications in a collective agreement. In order to substantiate a surface bargaining complaint, it is not necessary to prove animus nor is it necessary to demonstrate that separate aspects of bargaining conduct constitute per se violations of section 15. Such findings will strengthen the inference that surface bargaining has occurred, but even in the absence of such indicia of bad faith, the totality of bargaining conduct may still lead to the inference that a party does not wish to sign a collective agreement. (See *The Daily Times*, [1978] OLRB Rep. July 604; *Reed & Prince Mfg. Co.*, (1981) 28 L.R.R.M. 1608.) I suggest that if the majority's view in this decision is followed in future cases, it will be virtually impossible to substantiate a surface bargaining complaint without demonstrating animus or a range of specific violations of the Act.

3. Turning to the evidence, it is essential to review a number of matters which receive inadequate attention in the majority decision. First, I would emphasize that Mr. Hubert stated in examination-in-chief that if Eaton's were to improve wages and benefits for its unionized employees, this "would simply encourage employees in our other stores to organize". The significance of this statement should not be underestimated; it not only undermines the company's justification for its position on wages but it also leads directly to the inference that Eaton's overall bargaining position has been influenced throughout by a purpose which conflicts directly with the public policy outlined in the preamble to the *Labour Relations Act*, that being to further harmonious labour relations in Ontario by encouraging collective bargaining. In cross examination Mr. Hubert acknowledged that Eaton's would prefer to operate union-free but he denied that its position on wages and benefits was designed to achieve this effect. Although the majority apparently accepts Mr. Hubert's testimony on this point (see ¶51), in my view it is simply not credible and should not be given any weight.

4. Second, the majority decision places little emphasis on the fact that the union filed its unfair labour practice complaint early in December and that hearings into the complaint began in mid-December. These dates become significant because the majority decision relies heavily on the new bargaining positions adopted by the company in negotiations on January 2 and January 7, approximately three weeks after the start of the hearing and remarkably close to the completion of evidentiary submissions. These negotiations resulted largely from the initiatives of this Board and this raises some very serious concerns about the curative effect of alterations by Eaton's in a number of its bargaining proposals at this late date and under these circumstances. Equally important is the obvious prejudice to the union as a result of entering into these negotiations. The fact that it agreed, in good faith, to meet again with the company should not rebound to its disadvantage in the determination of this complaint.

5. Third, I would note that evidence presented at the hearing indicated that the company's position on benefits appears to be influenced by its "feed back" system whereby the benefit package available to Eaton's employees is affected by the submissions of individual employees across the country. This suggests to me that Eaton's refusal to give more in the way of benefits to its unionized employees, when combined with this procedure for arriving at a benefits package, makes it impossible for the union to bargain on benefits, these being determined essentially by Eaton's direct negotiations with its non-unionized employees.

6. Fourth, I must comment on a finding of fact of which, although correct, obscures more than it illuminates. The majority decision notes that approximately thirty bargaining sessions took place until the union went out on strike. Later this is used to virtually determine the issue of whether the unavailability of Eaton's for bargaining in August constituted a violation of section 15 (see ¶40). This approach ignores that these bargaining sessions took place at six different locations and were spread out over a period of roughly seven months at Brampton and approximately five months at the other five locations. When this fact is viewed in the context of Eaton's rigid insistence that bargaining be conducted at each store, the number of actual bargaining sessions is considerably less impressive than might appear on the surface. On *average*, there was only one bargaining session per month at each location. Without question, more frequent bargaining occurred at Brampton, but conversely, less took place at the other locations.

7. At the outset, I adverted to the "gloss" which the majority places on a number of its factual conclusions. I indicated that the tone of the majority decision subtly undermines the thrust of the union's allegations and in doing so unjustifiably enhances the company's position. First, I would refer to the majority's conclusion in paragraph 40 that the union did not insist on more frequent bargaining sessions after the August delay, "in part no doubt" because McKay was already serving as chief spokesperson at four locations. The evidence put forward does not support the conclusion that either Mr. McKay, or other union personnel, would not have been available if more frequent sessions were to have been held. This conclusion also conflicts with the evidence that, on at least two occasions during the summer, the union specifically expressed its concerns in writing about the infrequency of negotiations. Nor does this conclusion stand comfortably with the fact that, on average, only six bargaining sessions were being held per month for all six locations. (No more than 7 occurred in any single month).

8. I also have strong reservations about the appropriateness of the majority's statement in paragraph 6 that it is "noteworthy" that the company did not commit any unfair labour practices during the certification drives at the six Eaton's stores. It might well have been noteworthy if the company had engaged in unfair labour practices, (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220, in ¶74), but I do not see why they should be credited for behaving in a manner which is mandated by law. While the commission of unfair labour practices, either during an organizing drive or during collective bargaining, may strengthen the inference that a party has been bargaining in bad faith, a finding of surface bargaining is not premised on the existence of conduct which, standing alone, would violate the Act.

9. I also find particularly objectionable the majority's treatment of Mr. McKay's statement that it seemed that Mr. Hubert had asked five hundred questions during the initial bargaining sessions at Brampton. It was obvious that Mr. McKay was merely conveying his impression of the course of bargaining at Brampton. The majority's "finding", that the actual number of questions asked fell far short of five hundred, strikes me as an offensive characteriza-



tion of the matter which tends to convey an impression that the general veracity of union testimony might be suspect.

10. The jurisprudence which applies to this case is not in dispute. The majority decision generally accepts the legal principles which, in the union's submission, govern the relevant facts. However, as I have already noted, there is no serious attempt to consider the totality of the company's bargaining conduct. While this, in itself, is a fatal shortcoming, a number of the union's allegations, even standing alone, should invite findings that Eaton's has breached section 15. When viewed in concert, the allegations support a conclusion that Eaton's has engaged in surface bargaining.

11. The union has argued that it is incumbent on the parties to a collective bargaining relationship to attempt to devise bargaining procedures which will facilitate the signing of a collective agreement. The Board itself has stated in *The Citizen*, [1979] OLRB Rep. March 177 (in ¶43) that:

... section 14 (now section 15) censures not only tactics destructive of the union's role as a bargaining agent ... but also tactics destructive of the collective bargaining process itself even where there exists on both sides a bona fide intention to conclude a collective agreement.

The majority is of the view that Eaton's was prepared to sign collective agreements with the union, and although I reject that assessment of the evidence, it is still open to find a breach of section 15 if the company has insisted on a bargaining process designed to frustrate the reaching of an agreement. I have no doubt that this is, in fact, what occurred. Although the company undoubtedly has the right to negotiate separate collective agreements for each of its stores, its rationale for insisting that it be able to bargain with the local committees at each location strikes me as disingenuous. Eaton's says it should be able to attempt to persuade these committees that its proposals are reasonable. To do this may require stating its position directly and forcefully to the local committees. In principle I have no disagreement with this argument; dialogue and persuasion are integral parts of the collective bargaining process. But inasmuch as the actual negotiations involved essentially the same spokespersons engaging in the same dialogue at six different locations for five to seven months, then different considerations arise.

12. The union has a right to expect that an employer will make reasonable arrangements to accommodate the demands of collective bargaining. If the employer chooses to rely entirely on a single spokesperson to conduct its negotiations, it is essential that that individual be reasonably available. In this instance, Eaton's relied exclusively on one individual to negotiate six different collective agreements. It then insisted that negotiations occur separately when it was obvious that the physical demands arising from six separate sets of negotiations would obviously limit Mr. Hubert's availability. To exacerbate the problem, Mr. Hubert was virtually unavailable for all of August. In the face of the union's repeated attempts to design a process more conducive to fruitful collective bargaining, the company's insistence on bargaining separately with each local committee is unjustifiable.

13. The company's interest in communicating directly with the local bargaining committees would easily have been accommodated by a process which involved all of the committees sitting at a common bargaining table, even if the end result was six separate collective agreements. When the union, in fact, made such a proposal to Mr. Hubert on November 19, he rejected it. He did agree, however, to "consider" two other union proposals designed to bring some members of the local committees into the Brampton bargaining sessions. When, in

January, the union decided to act unilaterally by bringing members of the local committees to the Brampton negotiations, Mr. Hubert then responded that the company could not dictate to the union the composition of its bargaining committee. Eaton's longstanding refusal to agree to some more centralized form of bargaining process appears patently unreasonable in light of its position in the January negotiations. If, at that point, it could not "dictate" to the union who it could or could not bring to the bargaining table, why was it necessary to "consider" a similar proposal in November? The refusal in November to do more than consider a sensible proposal designed to facilitate bargaining is not indicative of good faith.

14. The decision notes in paragraph 40 that the union may well have been in a position in September to "require" more frequent negotiations at each of the stores. As mentioned earlier, the majority feels the union did not do so because Mr. McKay would not have been free to conduct all of the bargaining sessions. I reiterate that the evidence does not support this finding, especially in light of the fact that no more than seven negotiating sessions occurred in any one month. The evidence does show, however, that the union expressed its concerns about the delay in negotiations first in July and then again in August. It is not clear what the majority feels the union could have done to insist that more regular bargaining sessions take place. The obvious inference I would draw from the majority's comments in paragraph 40 is that the union could have maneuvered itself into a position from which it could have made a successful unfair labour practice complaint. This, I suggest, is a totally unreasonable reading of the duty to bargain in good faith. The Act obligates the parties to a collective bargaining relationship to bargain with the shared intent of reaching a collective agreement. It is clearly improper for one of those parties to conduct its bargaining with an eye towards laying the foundations for a successful failure to bargain complaint. This, however, is precisely the inference which one makes from the majority decision.

15. The union's procedural allegations, standing alone, are sufficient to demonstrate a failure to bargain in good faith. The evidence shows that the union made repeated efforts both to speed up negotiations at the individual stores and to devise a bargaining process which might facilitate regular dialogue between the parties. Eaton's made no such efforts. Instead it insisted on a process which could only frustrate collective bargaining. While its desire to place its proposals directly before the local bargaining committees may be justifiable, that could easily have been realized in a more centralized forum. Having repeatedly refused to agree to such a process, it was incumbent on the company to make itself available for bargaining on a regular basis at each of the stores. This it failed to do. I conclude that Eaton's intransigent position on the bargaining process evidences a lack of good faith and results in a breach of section 15.

16. The union has also alleged that the content of a number of Eaton's bargaining proposals was so "patently unreasonable" or "devoid of business justification" that it supports an inference of surface bargaining. The majority did find that the company's insistence on a broad no-solicitation rule breached section 15. Similar conclusions should have been drawn in respect to the company's position on wages, benefits and job classifications and on proposed alterations to the bargaining unit descriptions.

17. The majority expresses "some concern" over the fact that on November 26, Mr. Hubert would not state clearly whether or not the company was prepared to include wages and job classifications in a collective agreement. The majority notes that "except in the most exceptional circumstances, an employer must be prepared to include employee wage levels in a collective agreement". It appears however that the concern over this position has been alleviated by the employer's offer on January 7 which had the effect of including these items

in an agreement. It is inexcusable to permit the events of January 7 to intrude on its consideration of the reasonableness of Eaton's position on wages and job classifications. The effect of the majority decision is to penalize the union for entering into the January negotiations; in doing so the union obviously prejudiced its case before this Board. This is a result which will not be lost on the labour relations community. It is enough that the union placed the wage and job classification issue squarely before Eaton's on November 26 and that the latter failed to respond. Eaton's did not alter this stance throughout the strike and when movement finally came on this issue, it was during the course of negotiations which were encouraged by this Board. It is repugnant to the notion of good faith that Eaton's now be credited with a change in position which only took place because of the Board's initiatives and which occurred long after the inception of hearings on the failure to bargain in good faith complaint. I conclude that Eaton's position on wage and job classifications has breached section 15 and is not cured by any shift in position on January 7.

18. I have previously alluded to the fact that the benefits package available to all of Eaton's employees is influenced by its employee "feed back" system. By virtue of the fact that Eaton's has refused to give its unionized employees wages or benefits which are superior to those of its non-unionized employees, it is virtually impossible for the union to even negotiate a benefits package. While a company may be under no obligation to pay its unionized employees more than its non-union employees, this does not remove the obligation to bargain on the issue of wages and benefits. If, however, it insists that these matters will be largely influenced by the wishes of its non-union employees it has abrogated its duty to bargain. But the matter does not end there. Mr. Hubert stated not only that Eaton's was under no obligation to provide more in the way of wages and benefits to its unionized employees than it gave to its non-union employees; he went on to add that if it did so "this would simply encourage employees in our other stores to organize." This is simply a patently improper consideration for the company to rely on in formulating its position on wages and benefits. An employer who develops a bargaining position on wages and benefits which is avowedly informed by a concern that giving more to its union employees may encourage its non union employees to organize, interferes with the rights of non-union employees to select a collective bargaining representative. By allowing illegal considerations to intrude on the bargaining process, the employer also violates the duty to bargain in good faith. I conclude that Eaton's stated rationale for refusing to give any more in the way of wages and benefits to its unionized employees than to its non-unionized employees constitutes a breach of section 64 and section 15.

19. The final matter is the issue of revising the scope of the bargaining unit descriptions. Although both parties sought to revise the bargaining units, it is clear that on October 15, the union informed the company that it was dropping its proposal to expand the scope of the bargaining units. The company's proposal remained on the table. The issue arose again in the January 2 negotiating session and when the union indicated firmly that it was not willing to change bargaining unit language, with the possible exception of the business centre in Scarborough, the company agreed to "abide" by the descriptions in the Board's certificates. The majority feels that Eaton's did not take this issue to impasse but I would emphasize the language in *Carpenters Employers Bargaining Agency*, [1978] OLRB Rep. Aug. 776 (in ¶18) where the Board observed that:

... Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, *must be removed from the bargaining table once a strike or lockout is imminent, or in progress. If such demands are not*



*removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith.*

[emphasis added]

Similarly, in *Toronto Star Newspapers*, [1979] OLRB Rep. May 451, (in ¶ 10) the Board stated that:

*While it is permissible for the parties to negotiate the description of the bargaining unit, the strike or lockout cannot be used to either augment or erode established bargaining rights. Bargaining demands having such effect, therefore, must be removed from the bargaining table once a strike or lockout is imminent or in progress.*

[emphasis added]

20. It is difficult to avoid the conclusion that it was incumbent on Eaton's to take its proposed revision of bargaining unit descriptions off the table once the strike ensued. This could easily have been accomplished simply by providing the union with written notification that it was withdrawing the proposal. The fact that it did not do so and, instead, left this demand outstanding for another five weeks should be determinative of the issue. As I have stated already in respect to several matters, I would not allow the company's position taken in the January meetings to cure the failure to drop the bargaining unit issue once the strike began.

21. In conclusion, I find that the company has negotiated on the issues of wages, benefits, job classifications and bargaining unit descriptions in a manner which violates the good faith obligation stipulated in the *Labour Relations Act*. It has done this as well on the no-solicitation issue. When these substantive proposals are placed alongside a rigid insistence on a bargaining process which effectively frustrated rather than facilitated collective bargaining, the inference is unmistakable that Eaton's has engaged in surface bargaining.

22. Based on these conclusions, I would have suggested the following remedial orders:

1. The respondent shall cease and desist from its unlawful conduct and henceforth shall bargain in good faith and make every reasonable effort to make a collective agreement.
  2. The respondent shall place a notice in each of the six workplaces affected by this complaint indicating that this Board has determined that the respondent has failed to bargain in good faith.
  3. In order to ensure that the striking employees are properly informed about this Board's determination, the respondent shall mail, at its own expense, a similar notice to each employee in the affected bargaining units as of the date of this Board's decision.
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**2884-83-R; 3039-84-U** Retail Wholesale and Department Store Union — Local 414 AFL-CIO-CLC, Applicant/Complainant, v. Dominion Stores Limited, Willett Foods Limited, **Termarg Food Services Limited**, Respondents

**Practice and Procedure — Related Employer — Union filing related employer application and unfair labour practice complaint — Seeking to add related corporations and their principals as parties — Purpose of providing “deep pocket” for collection — Request denied**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

***APPEARANCES:** James Hayes, B. A. Hanson, Sheila McIntyre and Robert McKay for the applicant/complainant; R. C. Fillion, Q.C. and C. R. Robertson for Dominion Stores Limited and Willett Foods Limited; James B. Noonan, Richard J. Nixon and Terence J. Nicol for Termarg Food Services Limited; Lorne Morphy, Q.C. and Richard Van Banning for Argcen Holdings Inc. and Argus Corporation; R. A. Spence for G. Montegu Black and Conrad M. Black.*

**DECISION OF THE BOARD;** March 25, 1985

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2. The applicant to these section 1(4) and 89 proceedings seeks to add as respondents the corporations Argcen Holdings Inc. and Argus Corporation as well as individuals Conrad and Montegu Black. The addition of the corporations is on the basis of an alleged reorganization on or about August 30, 1984, in which the respondent Dominion Stores Limited was to become 100 per cent owned by Argcen, which in turn is said to be a company under the control and direction of the Argus Corporation. The basis for adding the Blacks is essentially the allegation that they in one way or another, as major shareholders in Argus, or as officers and directors of the various Argus companies (including Dominion), direct and control the activities of Dominion Stores Limited. The applicant relies as well on published media accounts of direct involvement in the affairs of Dominion on such matters as the firing of its President, John Toma. In addition to these corporate developments already referred to, the applicant points to the recent sale of a substantial number of Dominion's stores to competitor A & P, together with other real property that previously had housed the head office and distribution facilities for Dominion Stores Limited.

3. While the Board can understand the applicant's concern over the impact on its current litigation of the events recently unfolding around it, the fact is that the respondent “Dominion Stores Limited” has apparently been operated for a good deal longer than the events in question as a subsidiary of the Argus group of companies. There is nothing new in that. More importantly, Dominion Stores Limited was, at the time of franchising, the corporate entity carrying on the business in question for that group, and continues to do so today, whether on the basis of the remaining 41 stores operated by it under its own name, or, as this application alleges, through its franchised “Mr. Grocer” stores as well. The applicant at the hearing advanced a number of credible concerns in support of its request to the Board to add additional parties, but its desire to insure the results of its various legal proceedings by way of further “deep pockets” did not emerge until counsel for Dominion tabled with the Board an earlier letter from counsel for the applicant. That letter asked that the applicant be furnished with a guarantee that the

additional corporations and individuals now sought to be added as respondents would honor any claims arising from the instant proceedings. The applicant stated its position as follows:

“We are currently actively reviewing, among other things, the possibility of seeking to name additional parties to the imminent Ontario Labour Relations Board proceedings which would include a corporation or corporations related to Dominion, and also the principal shareholders or persons in control of the corporations in their personal capacities.

Naturally we are quite anxious to avoid spawning additional grounds for controversy which may be unnecessary. There would clearly be no need to pursue such a course of action should the corporate and individual principals be prepared to provide us with a written guarantee that they would honour any claims which may be asserted whether or not Dominion continues in business.”

4. The Board in the relatively recent case of *Total Marketing Incorporated*, [1983] OLRB Rep. April 616, expressly addressed the issue of attempting to use section 1(4) of the Act solely as a means of collecting from a “deeper pocket”, where that other “pocket” is not itself engaging in the business to which the Union’s bargaining rights attach. The Board wrote:

The facts are not in dispute. The applicant has a bargaining relationship with Sepcographics Incorporated, which is a wholly owned subsidiary of the respondent Total Marketing Incorporated. In an arbitration award dated August 21, 1981, it obtained an order for the payment of \$3,403.39 against Sepcographics Incorporated. Sepcographics Incorporated was insolvent at the time of the arbitration and subsequently made an assignment in bankruptcy. The full amount of the arbitration award remains unsatisfied. By this application the applicant seeks to put itself in a position to realize its arbitration award, now registered in the Court as a judgment debt, against the respondent Total Marketing Incorporated.

The material before the Board establishes that the two corporate entities are under common control and direction, and would qualify as related companies within the meaning of section 1(4) of the Act. This is not a case, however, where the Board should exercise its discretion to declare that Total marketing Incorporated is a related employer for the purposes of the Act.

It is clear that Sepcographics Incorporated has ceased operations, and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense no undermining or erosion of the applicant’s bargaining rights. If it appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief, whether by way of declaration of successorship under section 63 of the Act or by the application of section 1(4). In those circumstances the Board could, by the operation of section 1(4) pierce the corporate veil in the interests of protecting the bargaining rights. (See e.g., *Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a “deep pocket” recovery of an unsatisfied debt against a related corporation.

The *Labour Relations Act* is predicated on the free choice of employees. It is also drafted in contemplation of the existing economic order, with due allowance for the realities of commercial law, including principles of limited liability for corporations. While section 1(4) provides an exception to that law for a limited purpose, that purpose must always be kept in mind. The section was not intended to extend bargaining rights, nor should it be used to extend the liabilities that arise under them, when bargaining rights have not in fact been transferred or undermined. (cf. *Re Cassin-Remco Ltd.*, [1980] 105 D.L.R. (3d) 138 (Ont. H.C.)). The Board should not generally allow a union with bargaining rights for the employees of a subsidiary to use section 1(4) to automatically obtain a declaration that its bargaining rights extend to the parent company and its employees, or to a sister company. We do not see why the consequences should be any different simply because



the subsidiary has become insolvent. (cf. *Chandelle Fashions*, [1982] OLRB Rep. June 828 at 848-49).

The Board is not without sympathy for the hardship suffered by the applicant. It is left with an uncollectable bad debt. That result, however, is a risk that unions and employees have always assumed like all participants in the economic marketplace. Whether employees of a bankrupt subsidiary or their union should have a claim for an unpaid debt against a parent company that is solvent is a policy question of substantial consequence best resolved legislatively. It is not a result that should, absent clear and unequivocal language in the Act, be ushered in by this Board through a novel interpretation or application of section 1(4)."

5. That case has equal application to the matter before us. Apart from the application, where appropriate, of section 1(4) of the Act, the law recognizes the separate identity of each individual corporate entity, notwithstanding that a corporate entity in fact can act only through individuals, and may be controlled to a greater or lesser extent by other corporate entities, whether through the ownership of its shares or through the existence of common officers or directors. Here, as in the *Total Marketing* case, there is no allegation of a "transfer of the work", and thus the work opportunities of the employees for whom the applicant has bargaining rights, other than to the extent already covered by the application as filed (i.e. the franchising through Willett Foods Limited of "Mr. Grocer" stores), and apart from the sale of certain stores to A & P (which the applicant does not challenge). Were that to change, the full "successor" and "related employer" provisions of the *Labour Relations Act*, together with its unfair labour practice provisions, would again be available to the applicant for the purpose of litigating any claims it might have.

6. There is, of course, a companion section 89 complaint in these proceedings, as there was in *Penmarkay*, [1984] OLRB Rep. Sept. 1214, although the Board in that case did not deem it necessary to comment upon it. With respect to section 89 relief, the Board made it clear in *Sunnylea Foods*, [1981] OLRB Rep. Nov. 1640, and in *Daynes Health Care Limited*, [1985] OLRB Rep. Mar. 387, released March 5, 1985, that, in an appropriate kind of case, and at least where the corporate entity itself has disappeared, or has explicitly threatened to do so if a full measure of damages is claimed, the Board is not unprepared to affix liability to an individual or "person" acting on behalf of the corporate employer. But again, every corporation must ultimately act through individuals, and the applicant has been unable to plead (nor, as in *Sunnylea* and *Daynes*, has prior litigation shown) a course of conduct anywhere close to the exceptional circumstances causing the Board to consider the steps it did in those latter two cases.

7. On the basis of the foregoing, the request of the applicant to expand the list of parties beyond those already encompassed by the present proceedings is denied.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1985

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**1493-84-R:** United Steelworkers of America, (Applicant) v. Elks Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Elks Inc., at its distribution centre in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, display staff, buyers, quality control personnel, and persons regularly employed for not more than twenty-four hours per week." (32 employees in unit).

**1628-84-R:** United Steelworkers of America, (Applicant) v. Osterley Investments Ltd., Adam Hay Holdings Ltd., and 462862 Ontario Ltd., carrying on business in limited partnership as Benwind Industries, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (49 employees in unit).

**2008-84-R:** Ontario Public Service Employees Union, (Applicant) v. Sudbury Algoma Hospital, (Respondent) v. Ontario Nurses' Association, (Intervener) v. Group of Employees, (Objectors).

Unit #1: "all paramedical employees of the respondent at Sudbury, Ontario, save and except supervisors, unit co-ordinators, persons above the rank of supervisor and unit co-ordinator, office and clerical staff, personnel services department employees, professional medical staff, activity therapy supervisors, director of volunteer services, programming co-ordinator, clinical programme co-ordinator, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (81 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the respondent regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period as paramedical employees, at Sudbury, Ontario, save and except supervisors, unit co-ordinators, persons above the rank of supervisor and unit co-ordinator, office and clerical staff, personnel services department employees, professional medical staff, and persons covered by subsisting collective agreement." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #3: "all employees of the respondent at its detoxification centre at Sudbury, Ontario, save and except supervisors and persons above the rank of supervisor." (36 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2079-84-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Bradley Kelly Construction (Utilities) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).



Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2213-84-R:** Ontario Nurses' Association, (Applicant) v. Atikokan General Hospital, (Respondent).

Unit #1: "all registered and graduate nurses regularly employed in a nursing capacity by the respondent at Atikokan, save and except the assistant director of nursing, persons above the rank of assistant director of nursing and persons regularly employed for not more than twenty-four hours per week." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four hours per week by the respondent at Atikokan, save and except the assistant director of nursing and persons above the rank of assistant director of nursing." (2 employees in unit). (*Having regard to the agreement of the parties*).

**2244-84-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Alexandria Builders Supplies Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Alexandria, Ontario, save and except foremen, persons above the rank of foreman, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2275-84-R:** Ontario Public Service Employees' Union, (Applicant) v. Sudbury Algoma Hospital, (Respondent).

Unit #1: "all paramedical employees of the respondent in its Community Clinics at Manitoulin Island, Espanola-Massey, Elliot Lake-Blind River and Chapleau, Ontario, save and except supervisors and program co-ordinators, persons above the rank of supervisor and program co-ordinator, office and clerical staff, personnel services department employees, professional medical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondent in its Community Clinics at Manitoulin Island, Espanola-Massey, Elliot Lake-Blind River and Chapleau, Ontario, save and except supervisors and program co-ordinators, persons above the rank of supervisor and program co-ordinator, paramedical employees, personnel services department employees, professional medical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements and Ontario Labour Relations Board Certificates." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2323-84-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Woodbridge Foam Corporation, (Respondent).

Unit: "all employees of the respondent at Tilbury regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office, clerical, technical, and sales staff." (46 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2395-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Roma Plumbing Ltd., (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton

Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2396-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Nortown Plumbing Ltd., (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondents in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2397-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Keele Plumbing & Heating Partnership, (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (56 employees in unit). (*Clarity Note*).

**2398-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Downsview Plumbing & Heating Co. Ltd., (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (38 employees in unit). (*Clarity Note*).

**2399-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. S. Breda Plumbing Limited, (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (26 employees in unit). (*Clarity Note*).

**2457-84-R:** Health, Office & Professional Employees, a Division of Local 206 United Food & Commercial Workers Union Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Century Manor Limited carrying on business as Century Manor Inn, (Respondent).

Unit #1: "all employees of the respondent at Brighton, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at Brighton, Ontario employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2519-84-R:** Canadian Union of Operating Engineers & General Workers, (Applicant) v. Trizec Equities Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all maintenance and janitorial staff employed by the respondent at the Carlingwood Shopping Centre in the City of Ottawa, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

**2539-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. D & B Plumbing Ltd., (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the Geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Clarity Note*).

**2540-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. East Gate Plumbing Inc., (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Clarity Note*).

**2604-84-R:** Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Partition Commercial Major Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office staff and persons covered by a subsisting collective agreement." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2633-84-R:** Ontario Public Service Employees Union, (Applicant) v. Carleton Ottawa Residence for the Disabled Inc., (Respondent).

Unit #1: "all employees of the respondent at Ottawa, save and except the executive director, persons above the rank of executive director, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation periods." (3 employees in unit). (*Having regard to the agreement of the parties*).



Unit #2: “all employees of the respondent at Ottawa regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except the executive director and persons above the rank of executive director.” (7 employees in unit).

**2695-84-R:** Ontario Public Service Employees Union, (Applicant) v. Catundra Day Care Centre Incorporated, (Respondent).

Unit: “all employees of the respondent in Belleville, save and except supervisors and persons above the rank of supervisor.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**2723-84-R** Amalgamated Clothing & Textile Workers Union, (Applicant) v. United Canada Ltd., (Respondent).

Unit: “all employees of the respondent at its Rapid Industrial Textile Division at Hamilton, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, students employed during the school vacation period and persons regularly employed for no more than twenty-four hours per week.” (33 employees in unit). (*Having regard to the agreement of the parties*).

**2731-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Grand & Toy Limited, (Respondent).

Unit: “all employees of the respondent at its warehouse operation at Hamilton, save and except foremen, persons above the rank of foreman, office and clerical staff, territorial sales staff, inside sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2742-84-R:** London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Salvation Army A. R. Goudie Eventide Home, (Respondent).

Unit: “all employees of the respondent in Kitchener, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2743-84-R:** Ontario Public Service Employees Union, (Applicant) v. Juvenile Detention (Niagara) Inc., (Respondent).

Unit #1: “all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, office manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the Regional Municipality of Niagara regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office manager.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2754-84-R:** United Steelworkers of America, (Applicant) v. Eric Westman Limited, (Respondent).

Unit: “all employees of the respondent at London, save and except foremen, persons above the rank of foreman, office and sales staff.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**2756-84-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. D.G.M. – Dominion General Manufacturing Limited, (Respondent).

Unit: “all employees of the respondent in Woodstock, Ontario, save and except supervisors, persons above the rank of supervisor and office and sales staff.” (39 employees in unit). (*Having regard to the agreement of the parties*).

**2766-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Vitullo Brothers Plumbing Ltd., (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the Geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (36 employees in unit). (*Clarity Note*).

**2773-84-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Canlube Ltd. (c.o.b. as Mr. Lube Truck Centre), (Respondent).

Unit: “all employees of the respondent in Milton, Ontario, save and except Assistant Manager, persons above the rank of Assistant Manager, Management Trainees, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2775-84-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. E. R. St. Denis & Sons Ltd., (Respondents) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (13 employees in unit).

**2797-84-R:** United Steelworkers of America, (Applicant) v. Home Technics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (60 employees in unit). (*Having regard to the representations of the parties*).

**2799-84-R:** Canadian Union of Public employees, Local 1281, (Applicant) v. Toronto Committee for the Liberation of Southern Africa, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto.” (2 employees in unit).

**2813-84-R:** Sheet Metal Workers’ International Association Local Union 537, (Applicant) v. Bertozzi Roofing & Sheet Metal Inc., (Respondent).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of

the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2833-84-R:** United Food and Commercial Workers International Union, (Applicant) v. Horizon Plastics Limited, (Respondent).

Unit #1: “all employees of the respondent in Cobourg, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (37 employees in unit). (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in Cobourg regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff.” (3 employees in unit).

**2834-84-R:** United Electrical Radio and Machine Workers of Canada (U.E.), (Applicant) v. GTE Sylvania Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in its H.I.D. Fixtures Division in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office, sales, laboratory and engineering staff and students employed during the school vacation period.” (98 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2845-84-R:** Ontario Public Employees Union, (Applicant) v. Pritchard Building Services Ltd., (Respondent) v. Service Employees’ International Union, Local 204, (Intervener).

Unit: “all employees of the respondent employed at 26 Grenville Street in the City of Toronto, save and except supervisors and persons above the rank of supervisor.” (3 employees in unit).

**2854-84-R:** Ontario Catholic Occasional Teachers’ Association, (Applicant) v. The Welland County Roman Catholic Separate School Board, (Respondent).

Unit: “all occasional teachers employed by the respondent in its schools in the County of Welland.” (140 employees in unit).

**2864-84-R:** Service Employees International Union Local 204, (Applicant) v. Dustbane Enterprises Limited, (Respondent).

Unit: “all employees of the respondent at its Modern Building Cleaning Division at 55 St. Clair Avenue West in Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**2881-84-R:** Energy and Chemical Workers Union, (Applicant) v. DCA Canada Inc., (Respondent).

Unit: “all employees of the respondent at Trenton, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.” (70 employees in unit). (*Having regard to the agreement of the parties*).

**2886-84-R:** International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Canrose Drywall Company Limited, (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).



Unit #2; "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**2898-84-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Handi-Transit Windsor, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Windsor, save and except dispatcher, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2905-84-R:** United Steelworkers of America, (Applicant) v. American Can Canada Inc., (Respondent).

Unit: "all employees of the respondent at its Gilbertson Drive Plant in Simcoe, save and except foremen, persons above the rank of foreman, and office and sales staff." (17 employees in unit). (*Having regard to the agreement of the parties*).

**2906-84-R;** Energy and Chemical Workers Union, (Applicant) v. Smurfit Papertube Limited, (Respondent).

Unit: "all employees of the respondent at Kingston, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

**2939-84-R:** International Union, United Automobile, Aerospace & Agricultural Workers of America, (U.A.W.), (Applicant) v. Bundy of Canada Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Delhi, save and except supervisors, persons above the rank of supervisor, plant engineer, office and sales staff." (63 employees in unit). (*Having regard to the agreement of the parties*).

**2946-84-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Brimac Anodizing Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, quality control inspector, chemist and office and sales staff." (37 employees in unit).

**2947-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Egan Visual Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant in Woodbridge, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (69 employees in unit). (*Having regard to the agreement of the parties*).

**2959-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Board of Education for the City of Etobicoke, (Respondent).

Unit: "all office and clerical employees of the respondent in its elementary schools in the City of Etobicoke, Ontario regularly employed for not more than 24 hours per week, save and except supervisors,

persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights.” (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2961-84-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Preston Metal and Roofing Products Ltd., (Respondent).

Unit: “all employees of the respondent in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff.” (71 employees in unit). (*Having regard to the agreement of the parties*).

**2973-84-R:** Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Babco Plumbing Services Limited, (Respondent).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2975-84-R:** United Food & Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. ABC Elecro Powdercoating Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Port Hope, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (20 employees in unit). (*Having regard to the agreement of the parties*).

**3011-84-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. 577322 Ontario Limited c.o.b. as Senator Homes and Pol-Bee Investments Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2429-84-R:** Canadian Union Of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Campeau Corporation, (Respondent) v. Labourers’ International Union of North America, Local 597, (Intervener).

Unit: “all employees of the respondent at the Oshawa Shopping Centre, Oshawa, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (19 employees in unit). (*Having regard to the representations and agreement of the parties*).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		16
Number of ballots marked in favour of intervener		2

**2545-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Durham Board of Education, (Respondent).

Unit: "all employees of the respondent employed as classroom assistants in the Region of Durham regularly employed for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisors, persons covered by subsisting collective agreements and students employed during the school vacation periods." (50 employees in unit).

Number of names of persons on list as originally prepared by employer		50
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		7

**2562-84-R:** Service Employees' Union, Local 204 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The Wellesley Hospital Limited, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the Respondent in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office staff, employees in bargaining units for which any trade union held bargaining rights as of December 17, 1984." (115 employees in unit).

Number of names of persons on list as originally prepared by employer		88
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		51
Number of ballots marked against applicant		0

**2672-84-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. Harding Carpets Limited, (Respondent) v. International Union of Operating Engineers, Local 772, (Intervener).

Unit: "all stationary engineers employed in the Company's Power House in its Brantford Plant, save and except the chief engineer." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		0

#### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1799-84-R:** Canadian Union of Public Employees, (Applicant) v. Women's College Hospital, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and foremen; persons above the rank of supervisor and foreman; professional medical staff; registered graduate and undergraduate nursing staff; paramedical staff; office and clerical staff; security



guards; persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period; and students employed on a co-operative training program with a school, college or university.” (378 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		319
Number of names of persons on revised voters' list		323
Number of persons who cast ballots	276	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		190
Number of ballots marked against applicant		64
Ballots segregated and not counted		21

**2305-84-R:** International Union of Operating Engineers, Local 772, (Applicant) v. Hotel Dieu Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener #1) v. The Canadian Union of Public Employees, (Intervener #2).

Unit: “all stationary engineers employed in the operation of the heating and refrigeration equipment of the respondent at St. Catharines, save and except the chief Engineer and persons above the rank of Chief Engineer.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener #1		2

**2451-84-R:** International Molders & Allied Workers Union, (Applicant) v. Aluminum Reduction Company, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at its operation in Concord, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff.” (53 employees in unit).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		27
Number of ballots marked against applicant		24

**2452-84-R:** Ontario Catholic Occasional Teachers' Association, (Applicant) v. Metropolitan Separate School Board, (Respondent).

Unit: “all occasional teachers employed by the respondent in its schools in the Municipality of Metropolitan Toronto, save and except persons covered by subsisting collective agreements.” (596 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		584
Number of persons who cast ballots	218	
Number of ballots marked in favour of applicant		199
Number of ballots marked against applicant		16
Ballots segregated and not counted		3

**2678-84-R:** United Plant Guard Workers of America Local 1962, (Applicant) v. York University, (Respondent) v. Canadian Guards Association, Local 110, (Intervener).

Unit: “all security officers in the Department of Safety and Security Services employed to protect the property of York University in Metropolitan Toronto save and except supervisors, persons above the

rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (41 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		29
Number of ballots marked in favour of intervener		6

### Applications for Certification Dismissed – No Vote Conducted

**2428-83-R:** Sheet Metal Workers' International Association, Local Union 537, (Applicant) v. Harm Schilthuis and Sons Limited, (Respondent) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada, (Intervener). (33 employees in unit).

**1302-84-R:** Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. W. L. McDace Ltd., (Respondent) v. Group of Employees, (Objectors). (7 employees in unit).

**1704-84-R:** Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cornelius Manufacturing Company Limited, (Respondent) v. Group of Employees, (Objectors). (97 employees in unit).

**1804-84-R:** Syndicat Des Employes De Almico Plastics, (Applicant) v. Almico Plastics Ltd., (Respondent) v. Group of Employees, (Objectors). (30 employees in unit).

**2622-84-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. C.P.P. Plumbing Limited, (Respondent). (6 employees in unit).

**2801-84-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2737, (Applicant) v. Hinterhoeller Yachts Ltd., (Respondent). (89 employees in unit).

**2878-83-R; 2879-83-R:** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Creeds Storage Ltd., (Respondent) v. Employee, (Objector). (*Dismissed*).

**2989-84-R:** Canadian Union of Operating Engineers and General Workers, Local 101, (Applicant) v. BBC Brown Boveri Canada Inc., (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: “all stationary engineers operating in and out of the boiler room of the respondent at its Power Distribution Division on Dixie Road in Mississauga.” (3 employees in unit).

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**2210-84-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Roadside Developments Limited, carrying on business as the Flying Dutchman Hotel, (Respondent).

Unit #1: “all employees of the respondent in the Town of Newcastle save and except department heads, persons above the rank of department head, front desk staff, control clerk, persons regularly employed

for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		16

Unit #2: “all employees of the respondent in the Town of Newcastle regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, front desk staff and control clerk.” (24 employees in unit).

Number of names of persons on list as originally prepared		21
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		20

**2241-84-R:** London and District Service Workers’ Union Local 220, SEIU – AFL – CIO – CLC, (Applicant) v. Stratford Shakespearean Festival Foundation of Canada, (Respondent) v.Group of Employees, (Objectors).

Unit: “all office and clerical employees of the respondent in Stratford, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the Foundation, secretary to the executive director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		32
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		14

**2393-84-R:** United Steelworkers of America, (Applicant) v. Threadfast Manufacturing Ltd. (carrying on business as Spar Group, a Division of Threadfast Manufacturing Ltd.), (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		7

**2592-84-R:** United Electrical, Radio and Machine Workers of Canada (UE), (Applicant) v. The Barrie Plumbing & Electrical Supply Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Barrie, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and engineering staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).



Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		22

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1376-83-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Winnipeg Building & Decorating (1968) Ltd., (Respondent).

**0086-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Holiday Juice Ltd., (Respondent).

**2253-84-R:** United Rubber, Cork, Linoleum & Plastic Workers of America, (Applicant) v. Motor City Bandag Limited, (c.o.b. as J. & M. Tire), (Respondent) v. Group of Employees (Objectors).

**2281-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Pelee Island, (Respondent).

**2730-84-R:** Retail, Wholesale and Department Store Union, AFL:, CIO:, CLC:, (Applicant) v. Oak Run Farm Bakery, (Respondent).

**2772-84-R:** Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Applicant) v. 595578 Ontario Ltd., c.o.b. as Sandwich N' Such, (Respondent).

**2774-84-R:** Energy and Chemical Workers Union, (Applicant) v. Ralston Purina Canada Inc., (Respondent).

**2838-84-R:** International Union, United Automobile Aerospace and Agricultural Workers of America, (U.A.W.), (Applicant) v. Preston Metal & Roofing, (Respondent).

**2839-84-R:** Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Hamilton-Wentworth, (Respondent) v. International Union of Operating Engineers, Local 772, (Intervener).

**2888-84-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Trisen Tool & Die Limited, (Respondent).

**2937-84-R:** Service Employees Union Local 210 Affiliated with Service Employees International Union, AFL, CIO, CLC, (Applicant) v. The Metropolitan General Hospital, (Respondent).

**3141-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Pack-All Crating (Ontario) Inc., (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2374-84-R:** Service Employees' International Union, Local 204, A.F.L., C.I.O., C.L.C. (Applicant) v. Ballycliffe Lodge Limited and Valmed Health Services Inc., (Respondents). (*Withdrawn*).

**2381-84-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2420-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondent). (*Granted*).

**2422-84-R:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2422-84-R:** Ontario Provincial Conference of United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2426-84-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2625-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Nelvis Pez Drywall, a division of Nelvis Pez Developments Limited, 533851 Ontario Limited carrying on business as Pez Residential Drywall, (Respondents). (*Granted*).

**2629-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. K. Blok-Andersen Limited and Regal Homes and David Blok-Andersen carrying on business as Regal Homes, (Respondents). (*Granted*).

**2704-84-R:** Service Employees' International Union, Local 204, A.F.L., C.I.O., C.L.C., (Applicant) v. Ballycliffe Lodge Limited and 566625 Ontario Limited carrying on business as Madison Management, (Respondents). (*Withdrawn*).

**2714-84-R:** The International Brotherhood of Painters and Allied Trades, Local Union 1795, (Applicant) v. King Glass Ltd., and Casey Locke & Mary Locke carrying on business as King Glass, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**1660-84-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and Local 1474 (UAW), (Applicants) v. Collingwood Fabrics Inc., (Respondent) v. Group of Employees, (Objectors). (*Granted*).

**2194-84-R:** Ault Dairies, Division of Ault Foods Limited, (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647; Retail, Wholesale and Department Store Union, Local 440, (Respondent). (*Withdrawn*).

**2380-84-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2419-84-R:** International Union of Operating Engineers, Local 793, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondent). (*Granted*).

**2421-84-R:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2423-84-R:** Ontario Provincial Conference of United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2425-84-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2625-84-R:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Nelvis Pez Drywall, a division of Nelvis Pez Developments Limited, 533851 Ontario Limited carrying on business as Pez Residential Drywall, (Respondents). (*Granted*).

**2713-84-R:** The International Brotherhood of Painters and Allied Trades, Local Union 1795, (Applicant) v. King Glass Ltd., and Casey Locke & Mary Locke carrying on business as King Glass, (Respondent). (*Withdrawn*).

## UNION SUCCESSOR RIGHTS

**1570-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Lake Ontario Cement Limited, (Respondent). (*Granted*).

**1575-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Oak Park Sand and Gravel Company, (Respondent). (*Granted*).

**1602-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Wycott Trucking, (Respondent). (*Granted*).

**1605-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Lincoln Quarry Company, (Respondent). (*Granted*).

**1606-84-R:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Indusmin Ltd., (Nephton Site), (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0289-84-R:** Paul Winter, (Applicant) v. Ontario Sheet Metal Workers Conference, (Respondent) v. Julian Roofing (Ontario) Limited, (Intervener).



Unit: “all employees of Julian Roofing (Ontario) Limited engaged in the application of roofing, damp-proofing, waterproofing and all types of structure with all types of materials in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in unit). (*Dismissed*).

**0316-84-R:** Steve Crowe, Fred Downer and Mel Davis, (Applicants) v. International Union of Bricklayers and Allied Craftsmen, the Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen Local #17, (Respondents) v. Stuart Riel Masonry Contractor, (Intervener).

Unit #1: “all bricklayers, stonemasons and plasterers, their respective apprentices, improvers and working foremen employed by Stuart Riel Masonry Contractor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.” (4 employees in unit). (*Dismissed*).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Stuart Riel Masonry Contractor in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

**0951-84-R:** Jocelyn Young & Lynda Gattwald, (Applicant) v. United Food & Commercial Workers Local 1000A, (Respondent) v. Cara Operations Limited (Retail Stores Division), (Intervener).

Unit #1: “all employees of Cara Operations Limited (Retail Stores Division) in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario, save and except assistant managers, supervisors, and those above the rank of assistant manager or supervisor, pharmacists, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (14 employees in unit). (*Granted*).

Number of names of persons on revised votes’ list		26
Number of persons who cast ballots	26	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		16
Number of ballots marked against respondent		9

Unit #2: “all employees of Cara Operations Limited (Retail Stores Division) regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario, save and except assistant managers, supervisors, persons above the rank of assistant manager or supervisor; pharmacists and office and clerical staff.” (13 employees in unit). (*Granted*).

Number of names of persons on revised voters’ list		12
Number of persons who cast ballots	12	
Number of spoiled ballots		0
Number of ballots marked in favour of applicant		5
Number of ballots marked against respondent		7

**1057-84-R:** Margaret Slobozian, (Applicant) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Respondent) v. Atikokan Hotel, (Intervener).

Unit: "all employees of the Atikokan Hotel Association save and excepting the Owner or Manager, the Assistant Manager, the Desk Clerks (days and afternoon shifts) and the Bar Room Manager." (3 employees in unit). (*Granted*).

**1209-84-R:** Wayne Milford Wilken, (Applicant) v. Teamsters, Local 879, (Respondent) v. Inter-City Welding Supplies Ltd. Hanover Division, (Intervener).

Unit: "all employees of the intervener at Hanover, Ontario save and except supervisors, those above the rank of supervisor and office and sales staff." (1 employee in unit). (*Granted*)

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent	1	

**2147-84-R:** Employees of Shoppers Drug Mart, (Applicant) v. Retail, Wholesale and Department Store Union and its Local 414, AFL-CIO-CLC, (Respondent) v. Jack Holtzman Drugs Ltd., successor to E. Lee Drugs Limited, (Intervener).

Unit: "all employees of Jack Holtzman Drugs Ltd. in the Municipality of Metropolitan Toronto save and except graduate and undergraduate pharmacist, merchandise manager and persons above the rank of merchandise manager." (39 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	35	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		31

**2317-84-R:** G. Biesma and H. Clark, (Applicants) v. United Steelworkers of America, (Respondent) v. Lilo-Rail of Canada Limited, and Modern Plating Company Limited, (Intervener).

Unit: "all employees of Lilo-Rail of Canada Limited and Modern Plating Company Limited in Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period." (50 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	41	
Number of ballots marked in favour of respondent		15
Number of ballots marked against respondent		26
Number of segregated ballots cast by persons whose names do not appear on voters' list		1

**2318-84-R:** Mira Dragicevic, (Applicant) v. United Steelworkers of America, (Respondent) v. Ferrum Metal Manufacturing Limited, (Intervener).

Unit: "all employees of Ferrum Metal Manufacturing Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24 hrs.) per week and students employed during the school vacation period." (47 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		56
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Number of persons who cast ballots	48	
Number of ballots marked in favour of respondent		12
Number of ballots marked against respondent		36

**2333-84-R:** Carol S. Allen, (Applicant) v. Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461, (Respondent) v. General Bakeries Limited, (Intervener).

Unit: "all office and clerical employees of the intervener at the Township of Westminister, save and except plant accountant, persons above the rank of plant accountant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (13 employees in unit). (*Granted*).

Number of names of persons on revised voter's list		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		8

**2377-84-R:** Christopher Reynolds, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2557, (Respondent) v. The Canada Wood Specialty Company (1983) Limited, (Intervener).

Unit: "all employees of the intervener at Orillia, Ontario, save and except non-working foremen, persons above that rank, and office and sales staff." (29 employees in unit). (*Dismissed*).

**2511-84-R:** George Mihailidis, (Applicant) v. Canadian Union of Operating Engineers & General Workers Local 101, (Respondent) v. Midmetro Plastics Limited, (Intervener). (7 employees in unit). (*Dismissed*).

**2681-84-R:** Enzo Rossi, (Applicant) v. Retail, Wholesale Bakery & Confectionary Workers Union AFL-CIO-CLC Toronto, Ont. Local No. 461, (Respondent) v. Rudolph's Specialty Bakeries Limited, (Intervener).

Unit: "all driver salesmen employed by Rudolph's Specialty Bakeries Limited in Metropolitan Toronto, save and except route supervisors and persons above the rank of route supervisor." (1 employee in unit). (*Clarity Note*). (*Granted*).

**2682-84-R:** Aluminum, Brick and Glass Workers, Local 259G-A, Margaret Magyer, (Applicant) v. Aluminum, Brick and Glass Workers – International Union, (Respondent) v. National Pressed Glass, (Intervener).

Unit: "all office and clerical employees of National Pressed Glass Division of Douglas Inc. in Brantford, save and except except supervisors, persons above the rank of supervisor, financial accounting clerk, and persons covered by subsisting collective agreements." (1 employee in unit). (*Granted*).

**3006-84-R:** M. Perlman Enterprises Inc. and R. Perlman Enterprises Inc. carrying on business as Sunrise Records and Tapes, (Applicant) v. Retail Wholesale and Department Store Union AFL:CIO:CLC:, (Respondent). (10 employees in unit). (*Granted*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**2502-84-M:** Caswell Hotel (Sault) Limited, (Employer) v. Retail, Wholesale and Department Store Union, Local 582, (Trade Union). (*Dismissed*).



## APPLICATION FOR DECLARATION OF UNLAWFUL LOCKOUT

**2705-84-U:** Service Employees' International Union, Local 204, A.F.L., C.I.O., C.L.C., (Complainant) v. Ballycliffe Lodge Limited and 566625 Ontario Limited carrying on business as Madison Management, (Respondent). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0962-83-U:** Surjeet S. Dale, (Complainant) v. Graphic Communications International Union, Local 466, (Respondent) v. DRG Sellotape, A Division of DRG Inc., (Intervener). (*Dismissed*).

**1352-83-U:** United Steelworkers of America, (Complainant) v. John T. Hepburn, Limited, (Respondent). (*Dismissed*).

**1909-83-U; 1913-83-U:** Service Employees International Union, Local 204, (A.F.L., C.I.O., C.L.C.), (Complainant) v. Ballycliffe Lodge Limited, Medox Health Care Services, a division of Drake International Inc., and Drake International Inc., (Respondents). (*Withdrawn*).

**2651-83-U:** Richard McCormick, (Complainant) v. The International Association of Machinists and Aerospace Workers Local Lodge 1673, (Respondent) v. Worthington Canada Inc., (Intervener). (*Dismissed*).

**2972-83-U:** Jean Luc Majeau, (Complainant) v. The United Paperworkers International Union, Local 665, (Respondent) v. Kimberly Clark of Canada Limited, (Intervener). (*Withdrawn*).

**2981-83-U; 3046-83-U:** United Food and Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Imperial Flavours Inc., (Respondent). (*Dismissed*).

**0065-84-U; 0621-84-U; 0222-84-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Holiday Juice Ltd., (Respondent). (*Withdrawn*).

**0702-84-U:** Harry Rankel, (Complainant) v. U.A.W. Local 252, (Respondent) v. Fruehauf Canada Inc., (Intervener). (*Dismissed*).

**0891-84-U:** United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. Sunnybrook Foods Limited, (Respondent). (*Granted*).

**0999-84-U:** Retail, Wholesale & Department Store Union, AFL-CIO-CLC, (Complainant) v. Simpsons Limited, (Respondent). (*Dismissed*).

**1420-84-U:** Ontario Public Service Employees Union and its Local 576, (Complainant) v. The Ontario College of Art, (Respondent). (*Withdrawn*).

**1501-84-U:** International Woodworkers of America, (Complainant) v. Gordon McNabb Pallet Manufacturing Ltd., (Respondent). (*Withdrawn*).

**1735-84-U:** James W. McKnight, (Complainant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 113, (Respondent). (*Dismissed*).

**1798-84-U:** United Steelworkers of America, (Complainant) v. Osterley Investments Ltd., Adam Hay Holdings Ltd., and 462862 Ontario Ltd., carrying on business in limited partnership as Benwind Industries, (Respondents). (*Granted*).

**1893-84-U:** Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees Union, Local 1000, (Complainant) v. Ontario Hydro. Electrical Power Systems Construction Association, International Brotherhood of Electrical Workers, Labourers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, et al. (Respondents). (*Dismissed*).

**2017-84-U:** Mark Arbutovich, (Complainant) v. Canadian Paperworkers Union, Local No. 67, (Respondent) v. Abitibi-Price Inc., (Intervener). (*Dismissed*).

**2161-84-U:** John Goriel, (Complainant) v. Local 310, Canadian Paperworkers Union and P. Meade, (Respondents) v. Rolland Inc., (Intervener). (*Withdrawn*).

**2211-84-U:** United Food and Commercial Workers International Union, Local 175, (Complainant) v. Roadside Developments Limited, carrying on business as the Flying Dutchman Hotel, (Respondent). (*Withdrawn*).

**2212-84-U:** Alros Products Ltd., c.o.b. Polytarp Products, (Complainant) v. Canadian Textile & Chemical Union Balraj Gill, Wayne Porter, Brent Ormerod, Larry Folliott, and Laurell Ritchie and Frank Gulli, (Respondents). (*Withdrawn*).

**2253-84-U; 2254-84-U:** United Rubber, Cork, Linoleum & Plastic Workers of America, (Applicant) v. Motor City Bandag Limited (c.o.b. as J. & M. Tire), Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

**2294-84-U:** United Food & Commercial Workers International Union, (Complainant) v. 485376 Ontario Limited, (Respondent). (*Withdrawn*).

**2309-84-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Woodbridge Foam Corporation, (Respondent). (*Withdrawn*).

**2382-84-U:** Clifton Smith, (Complainant) v. Batronics, Inc., (Respondent). (*Dismissed*).

**2390-84-U:** Rudy Piluso, (Complainant) v. Executive Committee of United Brotherhood of Carpenters and Joiners of America, Local 38, (Respondent). (*Dismissed*).

**2430-84-U:** Surjit Singh Dhaliwal, Sankoth Lakhan, (Complainants) v. The Upholsterers' International Union of North America, AFL-CIO through its agent Local 30 and Bilt-Rite Upholstering Co. Ltd., (Respondents). (*Withdrawn*).

**2454-84-U:** John Charles Walker, (Complainant) v. International Union Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and U.A.W. Local 1285, (Respondent) v. Chrysler Canada Ltd., (Intervener). (*Dismissed*).

**2482-84-U:** Teamsters Local Union No. 897, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Brink's Canada Limited, (Respondent). (*Withdrawn*).

**2504-84-U:** Victoria Carpentry Limited, (Complainant) v. The Carpenters District Council of Toronto & Vicinity, (Respondent). (*Withdrawn*).

**2507-84-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Arasco Investments Limited and Allport Investments Limited, (Respondents). (*Withdrawn*).

**2508-84-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Ventra Manufacturing Ltd., (Respondent). (*Withdrawn*).

**2517-84-U:** United Steelworkers of America, (Complainant) v. Hostmann-Steinberg (Canada) Ltd., (Respondent). (*Withdrawn*).

**2525-84-U:** Andrew L. Antal, (Complainant) v. The Regional Municipality of Haldimand-Norfolk, (Respondent) v. Canadian Union of Public Employees, (Intervener). (*Dismissed*).

**2527-84-U:** Canadian Union of Educational Workers, Local 7, (Complainant) v. Ontario Institute for Studies in Education, (Respondent). (*Withdrawn*).

**2593-84-U:** Lee Graham, (Complainant) v. International Brotherhood of Painters & Allied Trades Local 200 and 1891, (Respondent). (*Withdrawn*).

**2594-84-U:** Lee Graham, (Complainant) v. Donalco Inc., (Respondent). (*Withdrawn*).

**2595-84-U:** Daniel Cartier, (Complainant) v. International Time Recorder Co. Ltd., (Respondent). (*Withdrawn*).

**2600-84-U:** Office & Professional Employees International Union, (Complainant) v. La Caisse Populaire De Kapuskasing Ltee, (Respondent). (*Withdrawn*).

**2606-84-U:** United Food and Commercial Workers International Union, Local 1105P, (Complainant) v. Maple Lynn Foods Limited, BON-EE-BEST EGGS DIVISION, (Respondent). (*Withdrawn*).

**2623-84-U:** Fatehally Khamisa, (Complainant) v. Captall Investments Limited, (Respondent). (*Dismissed*).

**2662-84-U:** James McAuliffe, (Complainant) v. The United Steelworkers of America, (Respondent). (*Withdrawn*).

**2665-84-U:** Keith Palmer, (Complainant) v. G. Riesel (President) Leader Linen, (Respondent). (*Withdrawn*).

**2703-84-U:** Van Dresser Limited, (Complainant) v. The International Union, United Automobile, Aerospace and Implement Workers of America (U.A.W.) and its Local 1524, (Respondent). (*Withdrawn*).

**2711-84-U:** Michael Peter, (Complainant) v. Sears, (Respondent). (*Withdrawn*).

**2712-84-U:** Elizabeth Bristow, (Complainant) v. Sears, (Respondent). (*Withdrawn*).

**2736-84-U; 2760-84-U:** Canadian Union of Operating Engineers and General Workers Local 101, (Complainant) v. TDL Woodtreating Limited, (Respondent). (*Withdrawn*).

**2761-84-U:** Labourers' International Union of North America, Local 183, (Complainant) v. 470187 Ontario Limited known as "Kennedy Apartments", (Respondent). (*Withdrawn*).

**2770-84-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Withdrawn*).



**2784-84-U:** Labourers' International Union of North America, Local 493, (Complainant) v. The Corporation of the Municipality of Casimir, Jennings and Appleby, (Respondent). (*Withdrawn*).

**2802-84-U:** United Brotherhood of Carpenter sand Joiners of America, Local Union 2737, (Complainant) v. Hinterholler Yachts Limited, (Respondent). (*Withdrawn*).

**2804-84-U:** William (Bill) John Craine, (Complainant) v. The Regional Municipality of Niagara, (Respondent). (*Withdrawn*).

**2816-84-U:** Christian Labour Association of Canada, (Complainant) v. Niagara Ina Grafton Gage Home of the United Church of Canada, (Respondent). (*Withdrawn*).

**2866-84-U:** Everette Chapelle, (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent). (*Withdrawn*).

**2890-84-U:** Jack R Vernon, (Complainant) v. Frank Hooper, (Respondent). (*Withdrawn*).

**2909-84-U; 2910-84-U:** United Food and Commercial Workers, Local 175, (Complainant) v. Roadside Developments Limited, carrying on business as the Flying Dutchman Hotel, (Respondent). (*Withdrawn*).

**2934-84-U:** International Association of Machinists and Aerospace Workers Local Lodge 1755, (Complainant) v. Sangamo Canada, (Respondent). (*Withdrawn*).

**2968-84-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Handi Transit, (Respondent). (*Withdrawn*).

**2978-84-U:** Steve, Cyncora, (Complainant) v. Mal. P. Janigan, (Respondent). (*Withdrawn*).

**2980-84-U:** William H. Stevens, (Complainant) v. Local 1592 Millwrights & Machine Erectors, (Respondent). (*Withdrawn*).

**3016-84-U; 3017-84-U:** Retail, Wholesale and Department Store Union, AFL: CIO: CLC:, (Complainant) v. First Choice Hair Cutters, (Respondent). (*Withdrawn*).

**3110-84-U:** Everette Chapelle, (Complainant) v. All-Way Transportation Corp. (Wheel-Trans Division), (Respondent). (*Withdrawn*).

## FINANCIAL STATEMENT

**1744-84-U:** Chrisafina Alexiou, (Complainant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Granted*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0768-84-M:** Norfolk General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

**1187-84-M:** Canadian Union of Public Employees, Local 2210, (Applicant) v. The Regional Municipality of Haldimand-Norfolk, (Respondent). (*Withdrawn*).

**1365-84-M:** Canadian Union of Public Employees, Local 207, (Applicant) v. Corporation of the Town of Valley East, (Respondent). (*Granted*).

**1494-84-M:** Corporation of the Town of Valley East, (Applicant) v. Canadian Union of Public Employees, Local 207, (Respondent). (*Granted*).

**2019-84-M:** Renfrew County and District Board of Health, (Applicant) v. Ontario Nurses' Association, Local 49, (Respondent). (*Dismissed*).

**2109-84-M:** Service Employees Union, Local 204, (Applicant) v. Ballycliffe Lodge Limited, (Respondent). (*Withdrawn*).

**2145-84-M:** International Association of Machinists and Aerospace Workers Automotive Lodge 2332, (Applicant) v. Highland Ford Sales Limited and Riverside Chrysler Plymouth Ltd., (Respondents). (*Terminated*).

**2667-84-M:** Costi-IIAS Immigrant Services, (Applicant) v. Canadian Union of Public Employees, Local 2221, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**0213-84-OH:** Wilfred George Love, (Complainant) v. Toronto Transit Commission, (Respondent) v. Amalgamated Transit Union, Local 113, (Respondent Union). (*Dismissed*).

## COLLEGES COLLECTIVE BARGAINING ACT

### Employee Reference

**2446-84-M:** Ontario Public Service Employees Union, (Applicant) v. Fanshawe College, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**2436-81-M; 2437-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Yellow Jacket Welding Company Limited, (Respondent) v. Mechanical Contractors Association of Toronto, Mechanical Contractors Association of Ontario, (Intervenors). (*Granted*).

**2832-83-M:** Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bird Construction Company Limited and The General Contractors' Division of the Construction Association of Thunder Bay Incorporated, (Respondents) v. Julian Morelli, Peter Piotrowski, (Intervenors). (*Dismissed*).

**0392-84-M:** International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. City of Etobicoke, (Respondent) v. Canadian Union of Public Employees, Local 185, (Intervener). (*Withdrawn*).

**1785-84-R:** International Brotherhood of Electrical Workers, Local 105, (Applicant) v. Pomico Holdings Inc., P&M Electric (1982) Ltd., (Respondents). (*Withdrawn*).

**2938-84-M:** The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. G.O.S. Painting and Decorating Limited, (Respondent). (*Withdrawn*).

**2117-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Intrusion on Prepakt Limited, (Respondent). (*Withdrawn*).

**2120-84-M:** Ontario Allied Construction Trades Council, Labourers' International Union of North America, Local 597, (Applicant) v. The Electric Power Systems Construction Association and Ontario Hydro, (Respondents). (*Dismissed*).

**2139-84-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. Jeff Kearn Limited, (Respondent). (*Granted*).

**2389-84-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Royal Tile & Terrazzo, (Respondent). (*Granted*).

**2404-84-M:** The International Brotherhood of Painters and Allied Trades, Local Union 1795, (Applicant) v. King Glass Ltd., (Respondent). (*Withdrawn*).

**2626-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Nelvis Pez Drywall, (Respondent). (*Granted*).

**2628-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. K. Blok-Anderson Limited and David Blok-Andersen carrying on business as Regal Homes, (Respondents). (*Granted*).

**2634-84-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2654-84-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Victoria Carpentry Ltd., (Respondent). (*Granted*).

**2691-84-M:** Sheet Metal Workers International Association, Local 297, (Applicant) v. Tri-North Sheet Metal Limited, (Respondent). (*Withdrawn*).

**2716-84-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2717-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2718-84-M:** Ontario Provincial Conference of United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).

**2719-84-M:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Granted*).



**2732-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Cliffside Pipelayers Limited and The Pipe Line Contractors Association of Canada, (Respondent). (*Withdrawn*).

**2744-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Pit-On Construction Company Limited, (Respondent). (*Granted*).

**2758-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Wm. Finkle Crane Rentals Limited, (Respondent). (*Granted*).

**2790-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Joseph Schmidt Carpentry Ltd., and S H Carpentry Ltd., (Respondent). (*Withdrawn*).

**2829-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Jackson Lewis Co. Ltd., (Respondent). (*Withdrawn*).

**2831-84-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Rock Construction and Management Ltd., (Respondent). (*Granted*).

**2837-84-M:** International Union of Elevator Constructors, Local #50, (Applicant) v. Schindler-Armor Elevator Company Limited, (Respondent). (*Withdrawn*).

**2857-84-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. J. A. Norton & Co. Ltd., (Respondent). (*Granted*).

**2865-84-M:** Labourers' International Union of North America, Local 183, (Applicant) v. The Samario Group, (Respondent). (*Withdrawn*).

**2872-84-M:** Resilient Floorworkers, Local Union 2965, (U.B.C.J.A.), (Applicant) v. Saanich Enterprises Limited, (Respondent). (*Withdrawn*).

**2879-84-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Bectar Corp., (Respondent). (*Withdrawn*).

**2900-84-M:** Labourers Int. Union of North America, Local 506, (Applicant) v. Terra Construction Company, (Respondent). (*Withdrawn*).

**2902-84-M:** International Union of Elevator Constructors, Local 90, (Applicant) v. Dover Corporation (Canada) Ltd., (Respondent). (*Withdrawn*).

**2950-84-M:** Labourers' International Union of North America, Local 607, (Applicant) v. Cliffside Pipelayers, (Respondent). (*Withdrawn*).

**2955-84-M:** Resilient Floorworkers, Local Union 2965 (United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aldershot Flooring Limited, (Respondent). (*Withdrawn*).

**2971-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Omar Carpentry, (Respondent). (*Withdrawn*).

**2972-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. G. C. Carpentry & General Contractors, (Respondent). (*Withdrawn*).

**2979-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Canadian Engineering and Contracting Co. Limited, (Respondent). (*Granted*).

**2983-84-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. En-Con Ltd., (Respondent). (*Withdrawn*).

**2987-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Apoca Carpentry, (Respondent). (*Withdrawn*).

**2993-84-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Losereit Sales & Services Ltd., (Respondent). (*Withdrawn*).

**2994-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Paul K. Mace Interior Supply, (Respondent). (*Granted*).

**3004-84-M; 3005-84-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Precision Erectors, (Respondent). (*Withdrawn*).

**3025-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Holiday Carpentry Co. and Mastrantoni Construction Ltd., (Respondents). (*Granted*).

**3026-84-M:** The United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Eglinton Carpentry, (Respondent). (*Withdrawn*).

**3031-84-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 700, (Applicant) v. Etco Steel Tank Erectors Ltd., (Respondent). (*Granted*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1183-84-U:** Cameron Douglas Wonch, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Dismissed*).

**1569-84-U:** Steven Lenkey, (Complainant) v. United Steel Workers of America, Local 2868, (Respondent) v. International Harvester Canada Limited, (Employer). (*Denied*).

## CROWN TRANSFER

**2836-84-R:** Ontario Public Service Employees Union, (Applicant) v. Pritchard Building Services Ltd. and Her Majesty the Queen in Right of Ontario, (Respondents). (*Withdrawn*).









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